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PRODUCT LIABILITY REFORM ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1400

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

FEBRUARY 22, APRIL 5, AND MAY 10, 1990

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PRODUCT LIABILITY REFORM ACT

THURSDAY, FEBRUARY 22, 1990

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room SR-253, Russell Senate Office Building, Hon. Richard H. Bryan (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: Landa Lance; Moses Boyd, staff counsels; and Sherman Joyce, minority staff counsel.

OPENING STATEMENT BY SENATOR BRYAN

Senator BRYAN. Good morning, ladies and gentleman. I see we have a standing room only crowd this morning.

Today we begin our hearing on the liability issues involving product manufacture, sales and distribution, and specifically S. 1400 before this subcommittee. This is an issue that the Congress has been grappling with for a good many years. However, this is the first time that I, as a newly elected Member of this body, and some of my other colleagues who have joined us have had an opportunity to consider this legislation at the Federal level. And I must say that I approach it with great interest and with a healthy respect.

It is complex, it is controversial, and some of the best experts in the area are in stark disagreement over the proper course to take. This complexity and controversy is due in part, I suspect, to the vital importance of the interests that are at stake.

The proponents of S. 1400 believe that such legislation is necessary to enhance the ability of American business to be innovative and to compete with foreign companies. As much as anyone in the Senate, I believe that the competitiveness of American business is of critical concern and deserving of our best efforts. I firmly believe in American ingenuity and talent, and I want to see it operate in the most favorable environment possible.

At the same time opponents of this legislation suggest that it won't achieve the stated purpose, but that it will reduce the safety of products on the market and the ~~ability of~~ innocent victims to be compensated for their injuries. In chairing the Consumer Subcommittee for more than a year now, I have become increasingly aware of the myriad of dangers consumers can face if product safety is not carefully guarded.

Some argue that the product liability system has been helpful in making the products on the market as safe as they are, and that we must take care not to undermine any valuable results that accrue in that area.

And finally, I must say as a former governor I am acutely aware of the efforts of the states to craft product liability systems that work for their citizens. The states have spent considerable time and effort in this area and we must be sure, before we alter that work, that we know what we are doing.

This morning we will begin consideration of S. 1400 by looking at two general issues that must be explored in any consideration of Federal product liability legislation.

First, we want to learn what is really happening within the current system. Does it chill innovation and hamper the competitiveness of American business? Or does it adequately compensate victims and insure product safety? In short, is something broken that needs fixing?

Second, we want to explore the ramifications of placing some Federal law over an existing system of state law. Does that have positive or negative effects either legally or practically?

We have an impressive group of witnesses here today to help us answer these questions. They come from government, the academic community, the courts, state legislatures, and the business sector. We thank them for their assistance and look forward to their testimony.

I might just add parenthetically to the proponents of this legislation, a number of you have contacted me and urged hearings on this, as have some of my colleagues who have joined us today on the subcommittee. I was frankly distressed that four out of five of those who appear here this morning in support of this legislation did not provide their testimony to us until very late, after 4:00 o'clock yesterday afternoon. That makes it very difficult for our staff. It makes it difficult for us as subcommittee members to give your testimony the kind of carefully considered approach that I think this subcommittee wants to give it.

And I must say that if this should occur again, it would be my intention to cancel the hearing. So, let's get that testimony in a little early. We all give you fair notice, and we gave to the proponents, as well as to the opponents, their opportunity to select those who they felt were their most forceful advocates for the legislation and the most forceful defenders of the status quo.

Having said that, let me now yield to the Chairman of the full committee, Senator Hollings.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Well, thank you, Mr. Chairman. We certainly support the admonition that the statements should be in here on time.

In the words of our fearless leader, former President Ronald Wilson Reagan, here we go again. The supporters of this bill, Mr. Chairman, include a group that I worked with on labor law reform. I saw this movement begin back several years ago. We, the NAM, the Business Round Table, the Conference Board, and the Chamber of Commerce, succeeded in labor law reform.

And then having succeeded, and all dressed up with no place to go, they got on to Davis-Bacon until they learned that Davis and Bacon were both Republicans and Republican President Hoover had signed the measure, and that the inflation that they said that Davis-Bacon caused had disappeared. So, about five years ago, they started on this particular issue. At the same time, I was serving on President Reagan's Federalism Commission where we were going to federalize, get rid of this big bureaucracy on the banks of the Potomac and send authority back down to the states, the counties, and the cities. The best government was that closest to the people. And yet, here they came wanting to federalize tort law in respect to product liability.

I was rather non-plussed at it because I've been in the field. I've represented both sides. I've organized an insurance company. In fact, I think I still have the record under Manny Cohen before the Securities and Exchange Commission of an insurance company organized in 13 days.

I have represented the plaintiffs. I have defended the defendants. I know where the money goes, and if you want to really make money, you better get on the defendant's side because that's where they charge you by the hour. As long as I talk, for example, here this morning, most of this crowd out here are going to get paid.

They get paid by the hour.

Now, if you represent a poor plaintiff who has been injured, I can tell you now you're not going to get your money unless you win. And you have to win before a 12-man jury, and you have to get all 12, and then you have to get past all the hurdles of legal points made in the trial of the case. It is argued that there are runaway juries, but the real runaway juries are there in the corporate world where you get Pennzoil suing Texaco for $12 billion. That one verdict comprised more than all the product liability verdicts over a five year period in corporate America.

So, I happen to know that the money is going elsewhere, and I know about the insurance companies and their particular crunch at one time to catch up and cancel out everyone.

And on that particular score, we have tried over the years at this committee level to get the right information on the insurance companies. I hope, Mr. Chairman, you will have a hearing in that regard because we never could get the necessary information on the insurance issue. We were told it was not available, or they would send it up later, or what was sent was totally inadequate.

I happened to be governor and have reorganized insurance in my own state and know a little bit from the public end of that also. And on this particular point now you have bills over on the House side, and bills on the Senate side to federalize insurance. I don't see how this committee or this Congress can make a judicious decision in this particular regard unless we make a decision relative to the federalization of insurance also.

I feel that we really are barking up the wrong tree. I have asked the business leaders in my own state why they think that a liberal, Democratic Congress—because that's how they characterize us—is going to be more responsible than their own state codes and state jury systems.

And I have been informed by none other than Chief Judge, now Circuit Judge Wilkins, the chairman of our Sentencing Commission for President Reagan who presided as a trial judge, that there is no product liability problem in my state. All the other judges have told me that. And, of course, I know it because as governor that's what I would tell business, that you should move down to a responsible state. We didn't have runaway juries as is contended by the proponents of this particular bill. When it comes to punitive damages and actual damages, we know in most of the states like mine that you cannot get actual damages unless the judge approves it. He can cut the entire verdict at his own volition or give you a new trial. You get one or the other. And he can, at his own volition totally eliminate punitive damages.

We discuss strict liability, but most of the cases, of course, as has recently been determined by the Government Accounting Office, are decided on the basis of negligence.

I did not even know GAO was working on this report. It was requested over on the House side. The GAO report has just recently found that the current liability system was not a problem. The states were taking care of the situation. This only confirmed what the Rand study found some four years ago and another insurance study two years ago. We find no reason for the particular measure.

From my own experience, if I had to start, Mr. Chairman, in reorganizing tort law and start taking Federal jurisdiction over it, I would start perhaps with malpractice cases, then go to automobile cases, and then thirdly come to product liability because those are the incidents where there have been egregious, as we use that word up here in Washington, difficulties.

But here we go, all in the name of saving time, saving lawyers' costs and what have you, to institute a group of guidelines in this measure for the 50 states. The 50 states will each interpret the guielines, in their own way, and each interpretation will be appealed on up not only to the state supreme court, but to the United States Supreme Court. And this will occur despite the fact that what we are really interested in is saving time and bureaucracy and money.

It is ridiculous. It is a bad bill. The states' attorneys generals have come out against it. The states' supreme court justices have come out against it. The governors were against it. I understand they have recently changed. They ought to be embarrassed. I want to see the governor who comes up here to Washington to say he cannot handle product liability in his state. I have been one, been proud of it, been proud of the state jurisdiction in the subject of tort law over the years, the 200 and some years of our history as a state from the very beginning. And there have been outstanding and eminent jurists and legal scholars that will tell you this is a very defective measure.

It is not my intent to put in a bunch of amendments and delay it. It is my hope, Mr. Chairman, that you will have thorough hearings on this, at least one more and possibly a couple more hearings, so that we can bring out these particular factors. All the supporters have done is posture—any opposition is coming from the trial lawyers. Well, the trial lawyers do represent the injured. And you will find from the GAO report and other sources that the verdicts are not exorbitant and they are on the decline. The states are handling their responsibility.

It is not a Federal problem, and here we are racing around with the Armenians and product liability and not paying our own bill. We cannot take care of our own responsibilities at this congressional level. We reach out to try to take care of the states' responsibilities when, in fact, the majority of states in the last five years have confronted this particular problem, and become, in my view of it very, very responsive and responsible, far more than this Congress is at this time.

So, I would be delighted to hear these witnesses and how they find a crisis when no one else has found it.

Senator BRYAN. Mr. Chairman, I thank you.

We will next hear from Senator Gorton, who is the ranking member of the subcommittee and a cosponsor of the legislation. Senator Gorton.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. Mr. Chairman, thank you.

Mr. Chairman, I would like to thank you and Senator Hollings, the distinguished Chairman of the full Committee, for scheduling this important hearing today. Product liability reform is a very important issue, and I am pleased that the Consumer Subcommittee will consider the implication of federal preemption of state products liability laws in today's hearing.

Mr. Chairman, this issue is not new. The Commerce Committee has devoted considerable time and energy in the past to efforts to improve the current system. And I would point out that there is widespread agreement that the product liability system must be improved. The debate heats up when the different factions—business, consumer groups and lawyers—attempt to craft a solution.

Resolving this issue has been difficult because it is an effort to assign responsibility in many instances where no one is at fault. In such cases, the manufacturer and the product seller in many jurisdictions may be held strictly liable. Therefore, those individuals, having done nothing "wrong," are liable for the injuries sustained by the consumer as well as all of the pain and suffering and other noneconomic damages.

The debate has focused on fault too much in the past. Trying to decide who should suffer the losses when no one is at fault has proven to be a fruitless exercise. Both sides can claim to have prevailed on the merits. It is clear, however, that the system can be made fairer without threatening to leave an injured victim with no opportunity to be compensated adequately. S. 1400 does not revolutionize the system. It merely balances it and encourages speedy product liability settlements so that victims may recover quickly without facing enormous legal fees.

I congratulate Senator Kasten for his work in this area. He has been a leader in the effort to reform the product liability system, and I applaud him for introducing this fair and balanced legislation which enjoys considerable bipartisan support on the Commerce Committee.

Thank you, Mr. Chairman.

Now I will simply make a few other comments.

First, as the Chairman of the full committee has said, is that this legislation clearly has a long history. I suspect that it first came up perhaps before any of us, except for perhaps the Chairman himself, was a Member of the Senate. And I must confess that even while I was continuously here, much less during my two year sabbatical, from one hearing to another I constantly forgot what it was that had gone on before and had to continually be reeducated on a very complex and important issue. And that need for reeducation, I may say, Mr. Chairman, continues, and this hearing will play a major role in it.

Now, I will say, however, that that long history has not been without positive and favorable impact. Some of the statements which were made by the Chairman of the full committee indicate the positive and balanced changes which have taken place in the laws of many of the states providing at least a better basis from which to start than was the case a decade ago. And many of those changes in state law I suspect have been influenced by the proposition that there might be a preemptive Federal law passed. So, none of the proponents of this bill need to despair that their work has been totally in vain. It has not. It has just that it has not yet been completed.

There remains in the community, in the business community particularly, a great and a warranted concern about the impact of our present product liability system on innovation in the market and about productivity and about the competitive status of our businesses and industries with those which are based overseas and at least at the manufacturing stage do not face some of the problems which ours do as well.

This, of course, is a question in dispute. It is part of the reason for this hearing, to attempt to determine just what impact, negative as it may be, there is by reason of our product liability system.

What cannot be disputed, even though it can be glossed over, is the huge transaction costs which the present system places on the determination of liability. And whenever you have a system which has as high, often over 50 percent, a transaction cost, money which comes out of the pockets of manufacturers and distributors and retailers but does not find its way into the pockets of victims, you do have a serious problem which is well worthy not only of a hearing, but of some action as well.

The other point that I think is necessary to make is that the bill, S. 1400, which appears before us today, is only remotely related to bills which were introduced and were the subject of hearings in the early and mid-1980s. The Senator from Wisconsin, Senator Kasten, I think deserves a huge amount of credit for his devotion and persistence on an important issue, his willingness to go outside of his own historic field and become an acknowledged national expert in this one and his willingness constantly to listen to the views of others and to modify his own direction as a result of the concerns of others.

I think S. 1400 is a very thoughtful and rather modest approach to this problem. The bill, which the Senator from Missouri sponsored when he was chairman of this committee, was passed by this committee by a vote of 10 to 7 with my vote being on the negative side of it by reason of certain provisions which are not included in the present bill. But even so, that vote showed a great concern with this issue, a concern which was shared by many, perhaps not quite all, even of those who voted against it. And as a consequence, it seems to me that we now have a thoughtful, moderate, but nonetheless effective approach to a very, very real problem.

Because I am still learning or relearning the issues in this field, I am particularly interested in the critiques of this approach, both from those who feel that perhaps we should go farther and from those who feel that there is either no necessity for any legislation at all, or at least the necessity for legislation which is somewhat different than this.

Senator Bryan. Thank you very much, Senator.

We will now hear from the prime sponsor of the legislation, who has labored in the vineyards apparently for some years. Senator Kasten.

OPENING STATEMENT BY SENATOR KASTEN

Senator Kasten. Mr. Chairman, thank you. I am pleased that we are moving forward today with this hearing on S. 1400, the Product Liability Reform Act. And, Slade, thank you very much for your comments.

We have been at this a long time. I think we have made real progress, and we have now a bill which I think is going to be passed into law. With the active support of the administration that we shall hear expressed here today and the cosponsorship of more than a quarter of the Senate, I think that we now see this legislation gaining the kind of political critical mass that is needed in order to pass legislation. Ten of the cosponsors are members of this committee. I am confident right now that with the vote counts that we are getting, that S. 1400 would garner the votes of the majority of this committee.

Given the bipartisan support of this reasonable compromise reform package, I urge you, Mr. Chairman, to schedule this legislation for markup hopefully no later than the end of March.

And I am pleased with the comments of the Chairman of the committee saying that he does not intend to impede the progress by a whole series of amendments. I think maybe one more hearing, maybe two more hearings on certain aspects of this bill, depending on what happens, will suffice. But I do not think there is much purpose in delaying the whole process.

Nineteen ninety is the year for product liability reform. We cannot continue to let a small minority of opponents hold up this much needed and reasonable reform legislation from the majority any longer. We have a bill that can pass muster, and I think it is important now that we get it to a vote.

The key issue here—and I hope we can develop this in the hearings—is competitiveness. Europe 1992 is coming together on uniform product liability standards. We are going to be in a position very quickly in which Germany, France and England are going to have uniform laws, and Wisconsin, Minnesota and Illinois are going to be further apart than these countries in Europe. And we are trying to compete.

For the first time in years, we have an administration which is actively pushing for product liability reform. President Bush signaled his strong commitment to product liability reform by mentioning it in his State of the Union Address. Vice President Quayle has made it the centerpiece of the Council on Competitiveness' agenda. But the process starts in Congress, and so it is time for us to go forward. And I am very pleased that we are here.

Product liability reform would improve the competitiveness of U.S. manufacturers and sellers. It would protect the jobs of American workers, and it would benefit American consumers. Apart from reducing the legal costs—and we are going to be talking a lot about these transaction costs—and apart from encouraging safety, this reform package provides basic fairness to consumers and product producers and product sellers alike.

So, I look forward, Mr. Chairman, to working with you and the other members of the committee in bringing this matter before the full committee hopefully by the end of next month.

Senator **Bryan**. Thank you very much, Senator Kasten.

Another cosponsor of the legislation joins us this morning, Senator Danforth.

OPENING STATEMENT BY SENATOR DANFORTH

Senator **Danforth**. Mr. Chairman, thank you very much for chairing this hearing. And, Chairman Hollings, I want to express particular appreciation to you.

We have been going round and round on the subject of product liability for quite a long time. Back four or five years ago, when I was chairman of this committee, was the Golden Age of the Commerce Committee.

We spent endless days on the question of product liability. And as Senator Gorton pointed out, it was a close vote getting anything out of this committee, and then it died on the floor. And it has just been a very tough, very contentious issue.

The **Chairman**. It was golden because I had the majority at that time.

Senator **Danforth**. Well, I think that it is a very strong Silver Age now, Mr. Chairman. And I do want to compliment you on your generosity because you feel very strongly on the opposite side of this issue, and you have been willing to allow the Commerce Committee to move forward nonetheless. And I think it is characteristic of your chairmanship to handle it in this manner. It is clearly an important issue.

I was at a meeting some time ago and the chief executive officer of a St. Louis based company, Monsanto, was there, a man named Dick Mahoney. And he said that his company had developed over a period of years of research and development a product which was a substitute for asbestos. This product had all the advantages of asbestos, but it was not carcinogenic. And clearly it would have been a tremendous boon to mankind. The company had developed this product.

It was all set to go to market, and at the last minute Dick Mahoney said, no, we are not going to go forward. We are not going to take it to market. And the reason is that we would just be swamped with lawsuits even though we are totally convinced that the product is good.

I think that the status quo is totally unworkable. I think that it has made American business shell-shocked. I think that it has increased the cost of our products. It has made us less competitive in the world. It has cost who knows how many jobs in America.

It has called into disrepute the civil justice system itself. It has created the impression that the practice of law, that the bar of which I am a member and proudly so is a group of money-grubbing people who are elbowing each other aside on their way to clients. It has created in the public mind a sense that the courts are not for the people, that the courts are to enrich lawyers with transaction costs in these cases that amount to at least as much as whatever may eventually find itself into the hands of the injured party.

It is a system in which people who are badly injured are forced to settle early because the system drags itself on forever. And people who are only moderately injured can put their chips on the winning number and hope to strike it rich in the system.

So, I think this cries out for reform, and I am glad we are moving forward on it. I do hope that we can bring something to the floor of the Senate yet this year.

Senator **BRYAN**. Thank you very much, Senator Danforth.

Senator McCain, another cosponsor of the legislation, joins us this morning. Senator.

OPENING STATEMENT BY SENATOR McCAIN

Senator **McCAIN**. Thank you, Mr. Chairman. I'll be brief.

I would like to also express my appreciation to Senator Hollings, Chairman of the full committee, not only on this issue, but also on the issue of aircraft product liability which he also has graciously agreed to have considered by the full committee.

And I would also like to just again extend my appreciation to our friend from Wisconsin who has been with us for many years. I am sorry I was not around during this golden era. I thought that was the Lone Ranger days. But I do appreciate his many efforts on this issue.

And I think that there will be further debate, but I do believe that the climate in this country demands action on this issue more than perhaps it has in the past. And as is often said around here, there is time for every issue, and I think perhaps the time has come for this issue to be seriously addressed by both houses of Congress.

Thank you, Mr. Chairman.

Senator **BRYAN**. Thank you very much, Senator McCain.

I have statements that Senators Inouye and Burns would like to have included in the record.

[The statements and bill follow:]

OPENING STATEMENT BY SENATOR INOUYE

Mr. Chairman, I want to thank you for this opportunity to testify on this important matter.

This issue of product liability reform is not a new one in the halls of the Senate. We in the Commerce Committee have spent the last decade grappling with this issue. I recall in the 99th Congress, the extensive debate that occurred leading to the death of the bill.

The product liability reform measure before the Commerce Committee is a stripped down, modest version with no caps of any sort. I continue to oppose caps and any other provision which would expressly limit a judge or jury's authority to grant an award to an injured plaintiff. There are no such provisions in S. 1400. In my opinion, it strikes a fair balance. For example, S. 1400 contains procedures to encourage expedited settlements before pre-trial discovery by imposing penalties, i.e., payment of attorneys fees, for bad faith refusal to accept a reasonable settlement. I believe that this is advantageous for both sides. For this reason, I am an original sponsor for S. 1400.

As I understand it, the broad issue before the Subcommittee this morning is the propriety of enacting a federal statute establishing product liability standards and preempting state law. I believe that product liability reform is a proper issue for federal consideration because the products that allegedly cause the harm flow in interstate commerce. Manufacturers do business in any number of states, if not all fifty. Federal product liability laws, if enacted, would provide equity and predictability to all parties. They would provide incentives for proper behavior nationwide, as opposed to the "luck of the draw" which leads to the costly and inefficient practice of forum shopping. With federal standards, manufacturers will have strong incentives to take the necessary steps to produce safe products because they can no longer rely on the possibility that they will be sued in, or be given the opportunity to forum shop for, a pro-defendant state.

We in the Congress have the authority to enact a federal law pursuant to the Commerce Clause of the U.S. Constitution. I believe that it is an appropriate issue for consideration. I look forward to working with you toward its expedient consideration by the Commerce Committee. If my memory serves me correctly, product liability reform legislation has yet to be fully aired and debated on the Senate floor. I know that some of our colleagues who are not on the Commerce Committee are anxious to be heard—both pro and con. Accordingly, I believe that the time is ripe for timely consideration, and hopefully passage, by the full Senate in the near future.

OPENING STATEMENT BY SENATOR BURNS

I am very pleased that this Subcommittee has scheduled hearings on this important aspect of interstate commerce. I cannot think of an issue that is more a matter of interstate commerce than products liability and its effects on consumers and producers—on average, more than 70 percent of products made in a state are shipped out of state. The Commerce Committee has dealt with product liability proposals for almost a decade now. We have the responsibility to do our jobs and legislate wisely.

We have heard from hundreds of witnesses in hearings over the last ten years. While I am very appreciative of Senator Bryan for scheduling these hearings and of the witnesses who have taken time from their busy schedules to testify before us, we do not need more hearings. We need to get going.

S. 1400 is a modest proposal. Its preemption of state products liability laws is minimal. Its provisions are fair. The business community is not asking us to cut off consumers' rights to be compensated for their injuries. They are only asking us to give them some stability and uniformity in product liability laws.

We are not going to be able to solve all the problems in the product liability system, and we are not going to be able to make United States manufacturers completely competitive in the world market. But we can help. We can at least tell United States manufacturers that after they make a product the rules of the game are not going to change.

I strongly endorse S. 1400. It is my understanding that ten members of the Commerce Committee—exactly one-half of the Committee—are co-sponsors of S. 1400 and that a majority of the Committee have expressed support for the bill. We should get on with it. I hope that the Chairman will schedule a markup of this bill in March.

101st CONGRESS
1st Session

S. 1400

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

July 25 (legislative day, January 3), 1989

Mr. Kasten (for himself, Mr. Inouye, Mr. Danforth, Mr. Rockefeller, Mr. McCain, Mr. Exon, Mr. Pressler, Mr. Riegle, Mr. Gorton, Mr. Sanford, Mr. Burns, Mr. Lott, Mrs. Kassebaum, Mr. Chafee, Mr. Coats, Mr. Lugar, Mr. Helms, Mr. Boschwitz, and Mr. Bond) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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TITLE I

SHORT TITLE

Sec. 101. This Act may be cited as the "Product Liability Reform Act".

DEFINITIONS

Sec. 102. As used in this Act, the term—

(1) "claimant" means any person who brings a civil action pursuant to this Act, and any person on whose behalf such an action is brought; if such an action is brought through or on behalf of an estate, the term includes the claimant's decedent, or if it is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian;

(2) "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy such standard is more than that required under preponderance of the evi-

dence, but less than that required for proof beyond a reasonable doubt;

(3) "collateral benefits" means all benefits and advantages received or entitled to be received (regardless of any right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise) by any claimant harmed by a product or by any other person as reimbursement of loss because of harm to person or property payable or required to be paid to the claimant, under—

(A) any Federal law or the laws of any State (other than through a claim for breach of an obligation or duty); or

(B) any life, health, or accident insurance or plan, wage or salary continuation plan, or disability income or replacement service insurance, or any benefit received or to be received as a result of participation in any pre-paid medical plan or health maintenance organization;

(4) "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, traffic, commerce, or transportation described in clause (A);

(5) "commercial loss" means economic injury, whether direct, incidental, or consequential, including property damage and damage to the product itself;

(6) "economic loss" means any pecuniary loss resulting from harm which is allowed under State law;

(7) "exercise of reasonable care" means conduct of a person of ordinary prudence and intelligence using the attention, precaution, and judgment that society expects of its members for the protection of their own interests and the interests of others;

(8) "harm" means any harm recognized under the law of the State in which the civil action is maintained, other than loss or damage caused to a product itself, or commercial loss;

(9) "manufacturer" means (A) any person who is engaged in a business to produce, create, make, or construct any product (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product (or component part of the product); (B) a product seller with respect to all aspects of a product (or component part of a product) which are created or affected when, before placing the product in the stream of commerce, the product seller produces, creates, makes, or constructs

and designs or formulates, or has engaged another person to design or formulate, an aspect of a product (or component part of a product) made by another; or (C) any product seller not described in clause (B) which holds itself out as a manufacturer to the user of a product;

(10) "noneconomic loss" means loss caused by a product other than economic loss or commercial loss;

(11) "person" means an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);

(12) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(13) "product" means any object, substance, mixture, or raw material in a gaseous, liquid, or solid state (A) which is capable of delivery itself or as an assembled whole, in a mixed or combined state, or as a component part or ingredient; (B) which is produced for introduction into trade or commerce; (C) which has intrinsic economic value; and (D) which is intended for sale or lease to persons for commercial or personal use;

the term does not include human tissue, blood and blood products, or organs unless specifically recognized as a product pursuant to State law;

(14) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise is involved in placing a product in the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product; the term does not include—

(A) a seller or lessor of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; and

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(15) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision thereof.

PREEMPTION

SEC. 103. (a) This Act governs any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product. A civil action brought against a manufacturer or product seller for loss or damage to a product itself or for commercial loss is not subject to this Act and shall be governed by applicable commercial or contract law.

(b) This Act supersedes any State law regarding recovery for harm caused by a product only to the extent that this Act establishes a rule of law applicable to any such recovery. Any issue arising under this Act that is not governed by any such rule of law shall be governed by applicable State or Federal law.

(c) Nothing in this Act shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) supersede any Federal law, except the Federal Employees Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act;

(3) waive or affect any defense of sovereign immunity asserted by the United States;

(4) affect the applicability of any provision of chapter 97 of title 28, United States Code;

(5) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation;

(6) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground of inconvenient forum; or

(7) supersede any statutory or common law, including an action to abate a nuisance, that authorizes a State or person to institute an action for civil damages or civil penalties, cleanup costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution.

(d) As used in this section, "environment" has the meaning given to such term in section 101(8) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(8)).

(e) This Act shall be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

JURISDICTION OF FEDERAL COURTS

SEC. 104. The district courts of the United States shall not have jurisdiction over any civil action pursuant to this Act, based on section 1331 or 1337 of title 28, United States Code.

EFFECTIVE DATE

SEC. 105. (a) This Act shall take effect on the date of its enactment and shall apply to all civil actions pursuant to this Act commenced on or after such date, including any action in which the harm or the conduct which caused the harm occurred before the effective date of this Act.

(b) If any provision of this Act would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise time period, bring any civil action pursuant to this Act within one year after the effective date of this Act.

TITLE II

EXPEDITED PRODUCT LIABILITY SETTLEMENTS

SEC. 201. (a) Any claimant may bring a civil action for damages against a person for harm caused by a product pursuant to applicable State law, except to the extent such law is superseded by this title.

(b) Any claimant may, in addition to any claim for relief made in accordance with State law, include in such claimant's complaint an offer of settlement for a specific dollar amount.

(c) The defendant may make an offer of settlement for a specific dollar amount within sixty days after service of the claimant's complaint or within the time permitted pursuant to State law for a responsive pleading, whichever is longer, except that if such pleading includes a motion to dismiss in accordance with applicable law, the defendant may tender such relief to the claimant within ten days after the court's determination regarding such motion.

(d) In any case in which an offer of settlement is made pursuant to subsection (b) or (c) of this section, the court may, upon motion made prior to the expiration of the applicable period for response, enter an order extending such period. Any such order shall contain a schedule for discovery of evidence material to the issue of the appropriate amount of relief, and shall not extend such period for more than sixty days. Any such motion shall be accompanied by a supporting affidavit of the moving party setting forth the reasons why such extension is necessary to promote the interests of justice and stating that the information likely to be discovered is material, and is not, after reasonable inquiry, otherwise available to the moving party.

(e) If the defendant, as offeree, does not accept the offer of settlement made by a claimant in accordance with subsection (b) of this section within the time permitted pursuant to State law for a responsive pleading or, if such pleading includes a motion to dismiss in accordance with applicable law, within thirty days after the court's determination regarding such motion, and a verdict is entered in such action equal to or greater than the specific dollar amount of such offer of settlement, the court shall enter judgment against the defendant and shall include in such judgment an amount for the claimant's reasonable attorney's fees and costs. Such fees shall be offset against any fees owed by the claimant to the claimant's attorney by reason of the verdict.

(f) If the claimant, as offeree, does not accept the offer of settlement made by a defendant in accordance with subsection (c) of this section within thirty days after the date on which such offer is made and a verdict is entered in such action equal to or less than the specific dollar amount of such offer of settlement, the court shall reduce the amount of the verdict in such action by an amount equal to the reasonable attorney's fees and costs owed by the defendant to the defendant's attorney by reason of the verdict, except that the amount of such reduction shall not exceed that portion of the verdict which is allocable to noneconomic loss and economic loss for which the claimant has received or will receive collateral benefits.

(g) For purposes of this section, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and experience and the complexity of the case.

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

SEC. 202. (a) In lieu of or in addition to making an offer of settlement under section 201 of this title, a claimant or defendant may, within the time permitted for the making of such an offer under section 201 of this title, offer to proceed pursuant to any voluntary alternative dispute resolution procedure established or recognized under the law of the State in which the civil action for damages for harm caused by a product is brought or under the rules of the court in which such action is maintained.

(b) If the offeree refuses to proceed pursuant to such alternative dispute resolution procedure and the court determines that such refusal was unreasonable or not in good faith, the court shall assess reasonable attorney's fees and costs against the offeree.

(c) For the purposes of this section, there shall be created a rebuttable presumption that a refusal by an offeree to proceed pursuant to such alternative dispute resolution procedure was unreasonable or not in good faith, if a verdict is rendered in favor of the offeror.

TITLE III

CIVIL ACTIONS

SEC. 301. A person seeking to recover for harm caused by a product may bring a civil action against the product's manufacturer or product seller pursuant to applicable State or Federal law, except to the extent such law is superseded by this Act.

UNIFORM STANDARDS OF PRODUCT SELLER LIABILITY

SEC. 302. (a) Notwithstanding the provisions of section 301 of this title, in any civil action for harm caused by a product, a product seller other than a manufacturer is liable to a claimant, only if the claimant establishes by a preponderance of the evidence that—

(1)(A) the individual product unit which allegedly caused the harm complained of was sold by the defendant; (B) the product seller failed to exercise reasonable care with respect to the product; and (C) such failure to exercise reasonable care was a proximate cause of the claimant's harm; or

(2)(A) the product seller made an express warranty, independent of any express warranty made by a manufacturer as to the same product; (B) the product failed to conform to the warranty; and (C) the failure of the product to conform to the warranty caused the claimant's harm.

(b)(1) In determining whether a product seller is subject to liability under subsection (a)(1) of this section, the trier of fact may consider the effect of the conduct of the product seller with respect to the construction, inspection, or condition of the product, and any failure of the product seller to pass on adequate warnings or instructions from the product's manufacturer about the dangers and proper use of the product.

(2) A product seller shall not be liable in a civil action subject to this title based upon an alleged failure to provide warnings or instructions unless the claimant establishes that, when the product left the possession and control of the product seller, the product seller failed—

(A) to provide to the person to whom the product seller relinquished possession and control of the product any pamphlets, booklets, labels, inserts, or other written warnings or instructions received while the product was in the product seller's possession and control; or

(B) to make reasonable efforts to provide users with those warnings and instructions which it received after the product left its possession and control.

(3) A product seller shall not be liable in a civil action subject to this title except for breach of express warranty

where there was no reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.

(c) A product seller shall be treated as the manufacturer of a product and shall be liable for harm to the claimant caused by a product as if it were the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

SEC. 303. (a) Punitive damages may, if otherwise permitted by applicable law, be awarded in any civil action subject to this title to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product. A failure to exercise reasonable care in choosing among alternative product designs, formulations, instructions, or warnings is not of itself such conduct. Except as provided in subsection (b) of this section, punitive damages may not be awarded in the absence of a compensatory award.

(b) In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

(c)(1) Punitive damages shall not be awarded pursuant to this section against a manufacturer or product seller of a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)) or medical device (as defined under section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h)) which caused the claimant's harm where—

(A) such drug or device was subject to pre-market approval by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm or the adequacy of the packaging or labeling of such drug or device, and such drug was approved by the Food and Drug Administration; or

(B) the drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

The provisions of this paragraph shall not apply in any case in which the defendant withheld from or misrepresented to the Food and Drug Administration or any other agency or official of the Federal Government information that is material and relevant to the performance of such drug or device.

(2) Punitive damages shall not be awarded pursuant to this section against a manufacturer of an aircraft which caused the claimant's harm where—

(A) such aircraft was subject to pre-market certification by the Federal Aviation Administration with respect to the safety of the design or performance of the aspect of such aircraft which caused the claimant's harm or the adequacy of the warnings regarding the operation or maintenance of such aircraft;

(B) the aircraft was certified by the Federal Aviation Administration under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.); and

(C) the manufacturer of the aircraft complied, after delivery of the aircraft to a user, with Federal Aviation Administration requirements and obligations with respect to continuing airworthiness, including the requirement to provide maintenance and service information related to airworthiness whether or not such information is used by the Federal Aviation Administration in the preparation of mandatory maintenance, inspection, or repair directives.

The provisions of this paragraph shall not apply in any case in which the defendant withheld from or misrepresented to the Federal Aviation Administration information that is material and relevant to the performance or the maintenance or operation of such aircraft.

(d) At the request of the manufacturer or product seller, the trier of fact shall consider in a separate proceeding (1) whether punitive damages are to be awarded and the amount of such award, or (2) the amount of punitive damages following a determination of punitive liability. If a separate proceeding is requested, evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.

(e) In determining the amount of punitive damages, the trier of fact shall consider all relevant evidence, including—

(1) the financial condition of the manufacturer or product seller;

(2) the severity of the harm caused by the conduct of the manufacturer or product seller;

(3) the duration of the conduct or any concealment of it by the manufacturer or product seller;

(4) the profitability of the conduct to the manufacturer or product seller;

(5) the number of products sold by the manufacturer or product seller of the kind causing the harm complained of by the claimant;

(6) awards of punitive or exemplary damages to persons similarly situated to the claimant;

(7) prospective awards of compensatory damages to persons similarly situated to the claimant;

(8) any criminal penalties imposed on the manufacturer or product seller as a result of the conduct complained of by the claimant; and

(9) the amount of any civil fines assessed against the defendant as a result of the product complained of by the claimant.

UNIFORM TIME LIMITATIONS ON LIABILITY

SEC. 304. (a) Any civil action subject to this title shall be barred unless the complaint is filed within two years of the time the claimant discovered or, in the exercise of reasonable care, should have discovered the harm and its cause, except that any such action of a person under legal disability may be filed within two years after the disability ceases. If the commencement of such an action is stayed or enjoined, the running of the statute of limitations under this section shall be suspended for the period of the stay or injunction.

(b)(1) Any civil action subject to this title shall be barred if a product which is a capital good is alleged to have caused harm which is not a toxic harm unless the complaint is served and filed within twenty-five years after the time of delivery of the product. This subsection shall apply only if the court determines that the claimant has received or would be eligible to receive compensation under any State or Federal workers' compensation law for harm caused by the product.

(2) A motor vehicle, vessel, aircraft, or railroad used primarily to transport passengers for hire shall not be subject to the provisions of this subsection.

(3) As used in this section, the term—

(A) "time of delivery" means the time when a product is delivered to its first purchaser or lessee who was not involved in the business of manufacturing or selling such product or using it as a component part of another product to be sold;

(B) "capital good" means any product, or any component of any such product, which is of a character subject to allowance for depreciation under the Internal Revenue Code of 1986, and which was—

(i) used in a trade or business;

(ii) held for the production of income; or

(iii) sold or donated to a governmental or private entity for the production of goods, for training, for demonstration, or for other similar purposes; and

(C) "toxic harm" means harm which is functional impairment, illness, or death of a human being resulting from exposure to an object, substance, mixture, raw material, or physical agent of particular chemical composition.

(c) Nothing in this section shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person who is responsible for such harm.

UNIFORM STANDARDS FOR OFFSET OF WORKERS' COMPENSATION BENEFITS

SEC. 305. (a) In any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, any damages awarded shall be reduced by the sum of the amount paid as workers' compensation benefits for such harm and the present value of all workers' compensation benefits to which the employee is or would be entitled for such harm. The determination of workers' compensation benefits by the trier of fact in a civil action subject to this title shall have no binding effect on and shall not be used as evidence in any other proceeding.

(b) In any civil action subject to this title in which damages are sought for harm for which the person injured is entitled to receive compensation under any State or Federal workers' compensation law, the action shall, on application of the claimant made at claimant's sole discretion, be stayed until such time as the full amount payable as workers' compensation benefits has been finally determined under such workers' compensation law.

(c)(1) Except as provided in paragraph (2) of this subsection, unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller if the harm is one for which a civil action for harm caused by a product may be brought pursuant to this Act.

(2) Paragraph (1) of this subsection shall not apply if the employer or the workers' compensation insurer of the employer establishes, and the trier of fact determines, that the claimant's harm was not in any way caused by the fault of the claimant's employer or coemployees.

(d)(1) Except as provided in subsection (e), in any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third party tortfeasor may maintain any action for implied indemnity or contribution against the employer, any coemployee, or the exclusive representative of the person who was injured.

(2) Nothing in this Act shall be construed to affect any provision of a State or Federal workers' compensation law which prohibits a person who is or would have been entitled to receive compensation under any such law, or any other person whose claim is or would have been derivative from such a claim, from recovering for harm caused by a product in any action other than a workers' compensation claim against a present or former employer or workers' compensation insurer of the employer, any coemployee, or the exclusive representative of the person who was injured. Any action other than such a workers' compensation claim shall be prohibited, except that nothing in this Act shall be construed to affect any State or Federal workers' compensation law which permits recovery based on a claim of an intentional tort by the employer or coemployee, where the claimant's harm was caused by such an intentional tort.

(e) Subsection (d) shall not apply and applicable State law shall control if the employer or the workers' compensation insurer of the employer, in a civil action subject to this title, asserts or attempts to assert, because of subsection (c), a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller.

SEVERAL LIABILITY FOR NONECONOMIC DAMAGES

SEC. 306. (a) In any product liability action, the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c) As used in this section, the term—

(1) "noneconomic damages" means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation; the term

does not include objectively verificable monetary losses including, but not limited to, medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, rehabilitation and training expenses, loss of employment, or loss of business or employment opportunities; and

(2) "product liability action" includes any action involving a claim, third party claim, crossclaim, counterclaim, or contribution claim in a civil action in which a manufacturer or product seller is found liable for harm caused by a product.

DEFENSES INVOLVING INTOXICATING ALCOHOL OR DRUGS

SEC. 307. (a) In any civil action subject to this Act in which all defendants are manufacturers or product sellers, it shall be a complete defense to such action that the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug and that as a result of such intoxication or the influence of the alcohol or drug the claimant was more than 50 per centum responsible for the accident or event which resulted in such claimant's harm.

(b) In any civil action subject to this Act in which not all defendants are manufacturers or product sellers and the trier of fact determines that no liability exists against those defendants who are not manufacturers or product seller, the court shall enter a judgment notwithstanding the verdict in favor of any defendant which is a manufacturer or product seller if it is proved that the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug and that as a result of such intoxication or the influence of the alcohol or drug the claimant was more than 50 per centum responsible for the accident or event which resulted in such claimant's harm.

(c)(1) For purposes of this section, the determination of whether a person was intoxicated or was under the influence of intoxicating alcohol or any drug shall be made pursuant to applicable State law.

(2) As used in this section, the term "drug" means any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

○

Senator BRYAN. Mr. Willkie, as you can see, the members of the subcommittee have freely unburdened themselves this morning, and we are about to hear from you. It is always a pleasure to have you before the committee. You bring not only a distinguished political lineage, but an impressive personal resume. I had the pleasure of presiding over your confirmation hearing. So, I look forward, as I know the other subcommittee members do, with great interest to your testimony. We tender the floor to you.

We ask that you try to keep your testimony to five minutes because of the interest of the subcommittee and the questions that I know that will follow and a rather long list of witnesses this morning. Your full testimony will be made a part of the record for these proceedings.

STATEMENT OF WENDELL L. WILLKIE II, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. WILLKIE. Thank you, Senator, and I very much appreciate your gracious remarks.

I have transmitted a formal statement for the record.

Let me just begin by saying that Secretary Mosbacher was very disappointed not to be able to be here this morning to testify on behalf of this legislation. He is strongly committed to this, as is the rest of the administration. He feels that this is one of the most important things that we can do to enhance American competitiveness. And, unfortunately, his travel schedule today takes him overseas in pursuit of his official responsibilities.

He would appreciate the opportunity to appear at a subsequent time, not that we are asking for additional hearings, of course, but should there be additional hearings and schedules permit, I know that he would be delighted to appear here himself to testify.

In addressing this topic, President Bush has said, "A legislative priority for this administration will be the reform of our costly product liability laws. The burden of our present product liability system is excessive and adversely affects our ability to compete abroad."

If we are serious about enhancing our Nation's competitiveness, we must address the excessive burdens placed on American businesses by our current product liability system. We believe that this committee is now considering a very good, reasonable, moderate, bipartisan bill, S. 1400, and the Bush Administration strongly, strongly supports its enactment.

Now, there is much discussion of the dimensions of this problem and, of course, it is impossible to state a specific dollar figure for the cost of our current product liability system. Nevertheless, it is clear that the excessive costs of this system are felt every day by consumers and producers. They appear in the form of premiums added to the price of products that consumers buy, as well as in the valuable, new, innovative products which are not being introduced, not being introduced by American companies for fear of excessive product liability exposure.

Moreover, the costs imposed by American product liability are several times greater than the costs imposed by comparable laws in Europe and Japan. Thus, U.S. product liability laws place American firms at a competitive disadvantage vis-a-vis their foreign rivals.

Now, let me make this clear. We do not want to imitate anyone else's legal system. The fundamental American principles of due process and appropriate compensation for harmed individuals must be preserved. What we urge instead is elimination of the excessive costs of our system.

What we are calling for is enactment of a few basic, uniform rules that will increase certainty and predictability of American product liability law. It is the lack of certainty and predictability attributable to differences, radical differences in state product liability laws, as well as the application of these laws, that often discourages innovation and renders our system excessively costly.

State law reform is helpful and to be saluted, but it cannot change the fact that U.S. manufacturers whose products today are distributed interstate will remain uncertain as to what state law principle applies. Accordingly, while this administration respects federalism, we believe narrow, carefully tailored, Federal preemption is entirely appropriate in the product liability area.

Finally, I want to emphasize that harmed individuals will also benefit. By facilitating alternative dispute resolution and reducing uncertainty, S. 1400 will encourage quicker settlements. Thus, injured parties will receive compensation sooner than otherwise, and the excessive litigation costs of our product liability system will be substantially reduced.

In sum, the administration respectfully urges Congress to act on product liability reform now.

Thank you very much. And, of course, I welcome questions.

[The statement and questions and answers follow:]

STATEMENT OF WENDELL L. WILLKIE, II, GENERAL COUNSEL, DEPARTMENT OF COMMERCE

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THIS SUBCOMMITTEE TO DISCUSS THE PROBLEMS CAUSED BY OUR PRODUCT LIABILITY SYSTEM.

I. INTRODUCTION

FIRST, LET ME SAY THAT THE ADMINISTRATION STRONGLY SUPPORTS S. 1400. IN ADDRESSING THE NEED FOR PRODUCT LIABILITY REFORM PRESIDENT BUSH HAS SAID, "A LEGISLATIVE PRIORITY FOR OUR ADMINISTRATION WILL BE THE REFORM OF OUR COSTLY PRODUCT LIABILITY LAWS. THE BURDEN OF OUR PRESENT PRODUCT LIABILITY SYSTEM IS EXCESSIVE AND ADVERSELY AFFECTS OUR ABILITY TO COMPETE ABROAD."

WHEN VICE PRESIDENT QUAYLE ANNOUNCED THE PRESIDENT'S DECISION TO MAKE PRODUCT LIABILITY REFORM A TOP PRIORITY OF THE ADMINISTRATION, HE CALLED S. 1400 AN IMPORTANT FIRST STEP IN RESTORING BASIC PRINCIPLES OF FAIRNESS THAT PRESERVE THE U.S. COMPETITIVE POSTURE, WHILE AT THE SAME TIME SAFEGUARDING CONSUMER SAFETY. AS WITH ALMOST ANY LEGISLATION, THERE ARE IMPROVEMENTS THAT CAN BE MADE, AND WE STAND READY TO WORK WITH YOU TO STRENGTHEN THIS BILL. BUT IF WE ARE SERIOUS ABOUT ENHANCING OUR NATION'S COMPETITIVENESS, WE MUST ADDRESS THE EXCESSIVE BURDENS PLACED ON AMERICAN BUSINESSES BY THE PRODUCT LIABILITY SYSTEM.

WE HOPE THAT THE BIPARTISAN EFFORT THAT HAS EVOLVED AROUND S. 1400 WILL FINALLY BRING ABOUT MEANINGFUL FEDERAL PRODUCT LIABILITY REFORM LEGISLATION. THIS PROBLEM HAS BEEN DEBATED LONG ENOUGH. IT HAS BEEN STUDIED BY THE CONGRESS FOR OVER TEN YEARS. AS PRESIDENT BUSH SAID IN HIS STATE OF THE UNION ADDRESS, "IT'S TIME TO ACT TOGETHER."

II. PRODUCT LIABILITY AND INTERNATIONAL COMPETITIVENESS

TO COMPETE EFFECTIVELY IN THE INCREASINGLY COMPETITIVE INTERNATIONAL MARKETPLACE, THE UNITED STATES MUST OFFER THE BEST POSSIBLE PRODUCTS AND SERVICES AT THE LOWEST COST. MANY FACTORS ENTER INTO ANY FORMULA TO MAKE THE U.S. MORE COMPETITIVE. THESE INCLUDE FIGHTING UNFAIR TRADE PRACTICES, ENSURING THAT OUR LABOR FORCE IS WELL-EDUCATED, MAINTAINING REASONABLE AND EFFECTIVE EXPORT CONTROLS, SPEEDING UP THE COMMERCIALIZATION OF NEW TECHNOLOGIES, AND REMOVING OR REFORMING LEGAL BARRIERS THAT DIMINISH U.S. BUSINESSES' ABILITY TO COMPETE. THE EXISTING PRODUCT LIABILITY SYSTEM IS SUCH A BARRIER.

TWO FACTORS OFTEN CITED AS PLACING UNITED STATES BUSINESSES AT A DISADVANTAGE OVERSEAS ARE THE RELATIVELY LOWER COSTS OF THE LEGAL SYSTEMS IN OVERSEAS MARKETS AND THE FACT THAT INSURANCE PAYOUTS ARE LESS OVERSEAS. THIS DISADVANTAGE MAY BECOME EVEN GREATER AS EUROPEAN COUNTRIES PROCEED TOWARD A UNIFIED MARKET AND MORE EC MEMBERS IMPLEMENT THE EUROPEAN COMMUNITY COUNCIL DIRECTIVE ON PRODUCT LIABILITY.

AMERICAN COMPETITIVENESS IS HARMED BECAUSE OUR PRODUCT LIABILITY LAWS ARE MORE BURDENSOME AND UNPREDICTABLE THAN THOSE IN ANY OF OUR OTHER TRADING PARTNERS. FOR EXAMPLE, IN JAPAN JUDGES DETERMINE LIABILITY AND DAMAGES, DISCOVERY IS STRICTLY LIMITED, AWARDS FOR PAIN AND SUFFERING AND PUNITIVE DAMAGES ARE NOT AVAILABLE, AND THERE IS NO CONTINGENCY FEE ARRANGEMENT TO COMPENSATE LAWYERS. THE SAME STANDARDS ARE APPLICABLE TO THE LEGAL SYSTEMS IN THE EUROPEAN COMMUNITY. IN EUROPEAN COUNTRIES, JUDGES NORMALLY DETERMINE LIABILITY AND DAMAGES, DISCOVERY AND PUNITIVE DAMAGES ARE LIMITED, AND CONTINGENCY FEE ARRANGEMENTS AND PAIN AND SUFFERING AWARDS GENERALLY ARE NOT AVAILABLE.

NOW, WITH THE EUROPEAN COMMUNITY MOVING TOWARD A UNIFIED PRODUCT LIABILITY SYSTEM THROUGH THE ADOPTION OF THE COUNCIL DIRECTIVE ON PRODUCT LIABILITY, IT WILL HAVE ACHIEVED, IN LARGE PART, THE

UNIFORMITY THAT THE UNITED STATES HAS BEEN PURSUING FOR MORE THAN TEN YEARS IN THE FORM OF FEDERAL PRODUCT LIABILITY REFORMS. THE EUROPEAN COMMUNITY IS WELL ON ITS WAY TOWARD HARMONIZING THE LAWS, REGULATIONS AND ADMINISTRATIVE PROCEDURES OF THE MEMBER STATES WITH REGARD TO PRODUCT LIABILITY, WHILE AT THE SAME TIME CONFERRING UNIFORM PROTECTION TO CONSUMERS THROUGHOUT THE EC.

THIS IN NO WAY SUGGESTS THAT WE SHOULD TRY TO IMITATE THE PRODUCT LIABILITY LEGAL SYSTEMS IN EITHER JAPAN OR THE EC. OUR SYSTEM IS PERMEATED WITH CONCEPTS OF FAIRNESS AND DUE PROCESS THAT MUST BE PRESERVED. NOR WILL CHANGES IN OUR SYSTEM DRIVE DOWN COSTS AS LOW AS THOSE IN FOREIGN SYSTEMS. BUT NOW MORE THAN EVER, IN LIGHT OF INCREASING CONCERNS ABOUT INTERNATIONAL ECONOMIC COMPETITION, WE SHOULD BE WILLING TO UNDERTAKE MODEST, APPROPRIATE, AND REASONABLE REFORMS. IN THE VIEW OF THE BUSH ADMINISTRATION, S. 1400 -- WHICH IS ENTIRELY CONSISTENT WITH THE TRADITIONS AND SAFEGUARDS OF OUR PRODUCT LIABILITY SYSTEM -- MERITS YOUR SUPPORT.

III. THE PROBLEMS OF THE AMERICAN PRODUCT LIABILITY SYSTEM

I WILL NOW EXAMINE MORE CLOSELY THE NATURE OF THE PROBLEMS THAT BESET OUR PRODUCT LIABILITY SYSTEM. THE EXISTING SYSTEM HARMS

OUR ECONOMIC SECURITY BY RAISING THE PRICE OF AMERICAN PRODUCTS AND DETERRING PRODUCT DEVELOPMENT AND IMPROVEMENTS. LOWERING THE COSTS OF OUR PRODUCT LIABILITY SYSTEM IS CRUCIAL TO OUR GOAL OF ENHANCING THE ABILITY OF AMERICAN INDUSTRY TO COMPETE EFFECTIVELY ON A GLOBAL BASIS. THESE COSTS, WHICH I WILL DISCUSS IN MORE DETAIL LATER IN MY TESTIMONY, ARE BOTH DIRECT AND INDIRECT AND STEM FROM CHANGING LEGAL DOCTRINE.

IN THE PAST 25 YEARS, JUDGES HAVE EXPANDED UPON THE CONCEPT OF STRICT LIABILITY. THEY DEVELOPED NEW THEORIES OF RECOVERY, ESTABLISHED NEW LEGAL DUTIES, AND BROADENED THE SCOPE OF ALLOWABLE DAMAGES. I DO NOT MEAN TO IMPLY THAT THE CONCEPT OF STRICT LIABILITY ITSELF IS HARMFUL. WE SUPPORT THE LEGAL PRINCIPLE OF STRICT PRODUCT LIABILITY. I DO SUGGEST, HOWEVER, THAT STRICT LIABILITY IS NOW IN SOME CASES APPLIED WITHOUT REGARD TO ITS ORIGINAL LIMITATIONS. SUCH EXCESSES IN THE SYSTEM NEED TO BE CURED. IT IS THE INFREQUENT BUT EXCESSIVE CASE THAT HAS A DISPROPORTIONATE NEGATIVE IMPACT ON THE PRODUCT LIABILITY SYSTEM. BY ADOPTING A MORE MODERATE APPROACH, AND BY ELIMINATING THE EXTREMES IN THE SYSTEM, WE CAN RESTORE A LARGE DEGREE OF STABILITY AND CERTAINTY TO THE ADMINISTRATION OF OUR PRODUCT LIABILITY SYSTEM.

THE EXCESSES IN THE PRODUCT LIABILITY LEGAL SYSTEM STEM FROM A BELIEF THAT BUSINESSES CAN AND SHOULD BE FOUND LIABLE MERELY BECAUSE THEY HAVE A "DEEP POCKET" UPON WHICH THEY CAN DRAW TO COMPENSATE A PERSON FOR AN INJURY CAUSED BY A PRODUCT. WHAT EVERY BUSINESS EXECUTIVE FEARS UNDER THIS SYSTEM IS THAT, IF YOU MANUFACTURE OR DISTRIBUTE A PRODUCT, YOU STAND A GOOD CHANCE OF BEING FOUND LIABLE FOR CAUSING AN INJURY, EVEN THOUGH YOU ACTED IN A RESPONSIBLE MANNER.

IN A 1988 CONFERENCE BOARD SURVEY OF CEOs FROM BOTH LARGE AND SMALL BUSINESSES, 40% OF THOSE RESPONDING AGREED THAT PRODUCT LIABILITY WAS HAVING A MAJOR IMPACT ON THEIR COMPANIES. IT INFLUENCED HOW THEY PLANNED AND HOW THEY DID BUSINESS. IT AFFECTED HOW THEY SPENT HUGE AMOUNTS OF THEIR TIME AND, AS IMPORTANT, HOW THEIR ENGINEERS AND OTHER PROFESSIONALS SPENT LARGE BLOCKS OF TIME.

THE CEOs STATED THAT RATIONAL BUSINESS PLANNING IS SEVERELY AFFECTED BY THE UNCERTAINTY OF THE PRODUCT LIABILITY SYSTEM. THIS UNCERTAINTY ARISES FROM UNUSUALLY LARGE AND UNPREDICTABLE JURY AWARDS WHICH OFTEN INCLUDE UNFORESEEN PUNITIVE DAMAGE AWARDS. THE UNCERTAINTY IS ALSO A RESULT OF MANUFACTURERS BEING HELD LIABLE FOR INJURIES CAUSED BY ANCIENT PRODUCTS THAT HAVE

BEEN MODIFIED, OR FOR WHICH THE INJURY WAS TOTALLY UNFORESEEABLE WHEN THE PRODUCT WAS DESIGNED AND PRODUCED. AND, THE UNCERTAINTY IS CREATED BY THE APPLICATION OF MANY DIFFERENT LAWS THAT COME INTO PLAY BECAUSE OF THE FREE FLOW OF PRODUCTS IN INTERSTATE COMMERCE.

AS I HAVE SAID, THE PRODUCT LIABILITY SYSTEM IMPOSES BOTH DIRECT AND INDIRECT COSTS ON U.S. BUSINESSES. THE DIRECT COSTS CAN EITHER BE ABSORBED BY THE BUSINESSES, THUS REDUCING THEIR PROFIT MARGINS, OR THE COSTS CAN BE PASSED ON TO CONSUMERS IN THE FORM OF HIGHER PRODUCT PRICES. THE IMPACT THAT SUCH DIRECT COSTS HAVE ON INTERNATIONAL COMPETITIVENESS IS TELLING. THE CONFERENCE BOARD REPORT SETS FORTH A GOOD EXAMPLE. DOW CHEMICAL HAS APPROXIMATELY $13 BILLION IN ANNUAL SALES -- $7 BILLION FROM FOREIGN SALES AND $6 BILLION FROM DOMESTIC SALES. IN 1986, THE COMPANY'S LEGAL AND INSURANCE EXPENSES IN THE U.S. TOTALED MORE THAN $100 MILLION. OVERSEAS, LESS THAN $20 MILLION WAS SPENT FOR COMPARABLE SERVICES (FIVE TIMES THE COST FOR $1 BILLION LESS IN SALES). DURING 1987, DOW WAS THE DEFENDANT IN 456 SUITS IN THE U.S. ONLY FOUR SUITS WERE FILED AGAINST THE COMPANY OUTSIDE THE U.S.

THE ENORMOUS TRANSACTION COSTS ASSOCIATED WITH LITIGATION ARE

ANOTHER DIRECT COST THAT OVERBURDENS THE PRODUCT LIABILITY SYSTEM. IT IS DIFFICULT TO JUSTIFY EXTRAORDINARY TRANSACTION COSTS, PARTICULARLY WHEN THEY ARE BEING BORNE ULTIMATELY BY CONSUMERS WHO MUST PAY THROUGH HIGHER PRICES FOR GOODS AND SERVICES. THE INSTITUTE FOR CIVIL JUSTICE OF THE RAND CORPORATION CONCLUDED THAT IN 1985 TORT SYSTEM TRANSACTION COSTS TOTALLED $16 BILLION TO $19 BILLION. IN CONTRAST, ONLY $14 BILLION TO $16 BILLION WAS PAID IN NET COMPENSATION TO VICTIMS. SOMETHING IS TERRIBLY WRONG WITH A SYSTEM THAT REWARDS ATTORNEYS MORE THAN INJURED PARTIES.

THE INDIRECT COSTS OF EXISTING LAW ARE JUST AS TROUBLESOME AND, TO A LARGE EXTENT, CANNOT BE QUANTIFIED. THESE COSTS DO, HOWEVER, REFLECT A BUSINESS ATTITUDE ABOUT THE UNCERTAINTY OF THE PRODUCT LIABILITY SYSTEM. INDIRECT COSTS ARE REFLECTED IN USEFUL PRODUCTS BEING DISCONTINUED, DECISIONS NOT TO DEVELOP NEW PRODUCT LINES OR NOT TO CONTINUE PRODUCT RESEARCH, AND A FEAR TO INNOVATE.

IN THE CONFERENCE BOARD SURVEY, ALMOST HALF OF THE RESPONDING FIRMS REPORTED THAT THEY HAD DISCONTINUED PRODUCT LINES, 39% HAD DECIDED NOT TO INTRODUCE NEW PRODUCT LINES, AND 25% HAD DISCONTINUED PRODUCT RESEARCH. SOME MANUFACTURERS WILL SHUT DOWN

OPERATIONS COMPLETELY. THIS LEADS TO A LOSS OF JOBS. EXAMPLES OF THESE INDIRECT COSTS ARE WELL DOCUMENTED AND HAVE BEEN CITED AT EARLIER HEARINGS ON PRODUCT LIABILITY REFORM HELD BY THIS COMMITTEE AND OTHER CONGRESSIONAL COMMITTEES. MANY DECISIONS NOT TO MARKET SOCIALLY BENEFICIAL PRODUCTS THAT COULD IMPROVE THE HEALTH AND SAFETY OF AMERICAN CONSUMERS WERE BASED PRIMARILY ON THE FEAR OF POTENTIAL LIABILITY.

PRODUCT LIABILITY CONCERNS HAVE CHILLED RESEARCH AND DEVELOPMENT BY BOTH INDUSTRY AND THE ACADEMIC COMMUNITY. SOME REPORTS, INCLUDING THE CONFERENCE BOARD'S, INDICATE THAT UNIVERSITIES ARE SHYING AWAY FROM LICENSING PATENTS TO SMALL MANUFACTURERS BECAUSE OF THEIR FEAR THAT, AS THE ORIGINATORS OF THE IDEA UPON WHICH A PRODUCT WAS MANUFACTURED, THEY WILL BECOME THE "DEEP POCKET" IF THERE IS LITIGATION INVOLVING THE PRODUCT. THIS TYPE OF SITUATION THREATENS OUR LEADERSHIP IN RESEARCH AND DEVELOPMENT AND CAN ONLY HARM OUR OVERALL COMPETITIVENESS.

THE FACT THAT PRODUCT LIABILITY LAW IS BASED ON 50 DIFFERENT STATE LAWS COMPOUNDS THE PROBLEM. IN RECENT DECADES MANUFACTURERS CONTINUE TO FACE SUBSTANTIAL UNCERTAINTY AS TO THE EXACT NATURE OF THEIR PRODUCT LIABILITY EXPOSURE. MANUFACTURERS THAT OPERATE ON AN INTERSTATE BASIS HAVE A DIFFICULT TIME

DETERMINING WHICH LEGAL STANDARD WILL APPLY TO THEM OR WHETHER A PARTICULAR STANDARD WILL REMAIN CONSTANT. THUS, IF THEIR PRODUCTS ARE DISTRIBUTED NATIONWIDE, THEY ARE FORCED TO GEAR THEIR INSURANCE COVERAGE TOWARD THE RULES BEING DEVELOPED BY THE MOST "PRO-PLAINTIFF" JURISDICTION OF ALL.

A NUMBER OF STATE LEGISLATURES AND STATE COURTS HAVE BEGUN TO TAKE STEPS TO ADDRESS THE EXCESSES IN THEIR PRODUCT LIABILITY LAWS. WE APPLAUD THESE EFFORTS. PIECEMEAL STATE REFORMS, HOWEVER, ARE NOT ENOUGH. MAJOR DIFFERENCES AMONG THE STATES WILL REMAIN, PERPETUATING UNCERTAINTY.

AMONG THE RESPONSIBILITIES THAT THE CONSTITUTION VESTS IN THE CONGRESS IS THE POWER TO REGULATE INTERSTATE COMMERCE FOR THE GOOD OF ALL THE UNITED STATES. BECAUSE TODAY'S STREAM OF COMMERCE IS APT TO CARRY ALMOST ANY PRODUCT BEYOND THE STATE IN WHICH IT IS DESIGNED, MANUFACTURED, DISTRIBUTED FOR WHOLESALE, AND SOLD TO THE END-USER, QUESTIONS OF PRODUCT LIABILITY INEVITABLY RAISE INTERSTATE COMMERCE CONCERNS. THE FEDERAL GOVERNMENT CANNOT GIVE UP ITS RESPONSIBILITY IN THIS AREA AND MUST TAKE A LEADERSHIP ROLE. PRODUCT LIABILITY REFORM IS A NATIONAL PROBLEM THAT REQUIRES A FEDERAL SOLUTION.

IV. CONCLUSION

IN CONCLUSION, THE EXISTING PRODUCT LIABILITY SYSTEM IMPOSES COSTS AND CREATES UNCERTAINTY FOR AMERICAN COMPANIES, REDUCING THEIR PROFITABILITY AND LIMITING THEIR ABILITY TO COMPETE EFFECTIVELY IN THE INTERNATIONAL MARKETPLACE. IT DENIES JOB OPPORTUNITIES TO AMERICAN WORKERS BY CONTRIBUTING TO PLANT CLOSINGS AND DETERRING BUSINESS EXPANSION. IT HARMS AMERICAN CONSUMERS BY RAISING PRICES, DIMINISHING THE QUALITY OF GOODS, AND DENYING ACCESS TO SOCIALLY BENEFICIAL PRODUCTS THAT MANUFACTURERS WILL REFUSE TO PRODUCE. IT HARMS BOTH PLAINTIFFS AND DEFENDANTS IN PRODUCT LIABILITY LITIGATION BY GENERATING ENORMOUS TRANSACTIONS COSTS THAT ARE GREATER THAN THE FUNDS ACTUALLY PAID OUT FOR INJURIES CAUSED BY DEFECTIVE PRODUCTS.

IN SUM, THE DEFECTS OF THE AMERICAN PRODUCT LIABILITY SYSTEM ARE APPARENT. WE BELIEVE THAT THE TIME FOR FEDERAL PRODUCT LIABILITY LEGISLATION IS NOW. AFTER YEARS OF CONSIDERATION, WE HOPE THAT THE CONGRESS WILL JOIN THE ADMINISTRATION IN ENACTING A REFORM MEASURE. LET ME EMPHASIZE THAT THE ADMINISTRATION IS NOT ADVOCATING RADICAL CHANGE. IT IS CALLING FOR A MODEST, BALANCED REFORM FULLY IN KEEPING WITH THE TRADITIONS OF OUR LEGAL SYSTEM.

WE CALL FOR A REFORM THAT FULLY TAKES INTO ACCOUNT THE INTERESTS OF CONSUMERS AND HARMED INDIVIDUALS.

SUCH LEGISLATION IS NO PANACEA. NEVERTHELESS, IT WILL HELP MAKE AMERICAN GOODS MORE COMPETITIVE IN THE WORLD MARKETPLACE. BY HELPING TO CURE THE EXCESSES OF THE PRODUCT LIABILITY SYSTEM, IT SHOULD OVER TIME HELP HOLD DOWN THE PRICES OF A WIDE VARIETY OF PRODUCTS. IT WILL ENHANCE THE ABILITY OF AMERICAN FIRMS TO OFFER COMPETITIVELY PRICED NEW AND IMPROVED PRODUCTS. THUS CONSUMERS WILL BENEFIT AND EMPLOYMENT OPPORTUNITIES WILL EXPAND. FEDERAL LEGISLATION WILL ALSO HELP REDUCE THE HIGH TRANSACTION COSTS ASSOCIATED WITH THE EXISTING SYSTEM. THIS WILL ENABLE HARMED PARTIES TO RECEIVE THEIR FAIR COMPENSATION MORE QUICKLY. IN SHORT, A FEDERAL PRODUCT LIABILITY LAW WILL SERVE THE INTEREST OF ALL AMERICANS.

MR. CHAIRMAN, THAT CONCLUDES MY PREPARED REMARKS. I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

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GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

APR 10 1990

Honorable Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science
and Transportation
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

It was a pleasure to appear before your Subcommittee to testify on the need for Federal product liability reform. As Secretary Mosbacher reiterated in his appearance on April 5, the Administration believes that S. 1400 is a moderate, well-balanced proposal which would add significant stability and certainty to the product liability system while protecting the rights of American consumers.

As you requested, I have enclosed my answers to follow-up questions which will be made a part of the hearing record. I am ready to assist you in any way that I can on this issue. I look forward to working with you and the other members of the Commerce Committee as S. 1400 progresses through the Senate.

Sincerely,

Wendell L. Willkie, II

Wendell L. Willkie, II
General Counsel

Enclosure

ANSWERS FOR QUESTIONS FOR THE RECORD
OF THE CONSUMER SUBCOMMITTEE'S
FEBRUARY 22, 1990 HEARING ON S. 1400

1. In your testimony you stated that there was substantial evidence that insurance rates have risen dramatically as a consequence of the costs associated with the current tort system. Could you please provide this evidence to the subcommittee?

Answer: The Report of the Tort Policy Working Group on the "Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability" that was published in February 1986, and the Tort Policy Working Group's "Update on the Liability Crisis" published in March 1987 presents a very good picture of how insurance rates have risen as a result of liability considerations. A good part of that increase can be attributed to the uncertainty and unpredictability of the liability system. In addition, the 1988 Conference Board Report provides an analysis of the costs and availability of liability insurance. I have included the relevant portions of these reports that deal with insurance availability and affordability.

2. Do you have any information about whether the enactment of S. 1400 would lower the costs of insurance for manufacturers and businesses?

Answer: As Secretary Mosbacher stated at the April 5 hearing, we do not expect an immediate lowering of premiums because of product liability legislation. We would expect that as the costs of coverage go down, premiums will decline. This will only occur over time. Product liability legislation should be a factor in causing coverage costs to decline because it should add some predictability and stability to the product liability system.

3. Do you think there is a need for any insurance-related legislation to make American businesses more competitive?

Answer: Any decision to enact insurance-related legislation should be reached on its own merit and not be linked to product liability reform. Such legislation raises a complex set of questions about state regulation of insurance that are independent from product liability reform. The Administration has not yet formulated a position on whether such legislation should be sought.

4. You stated that a majority of the costs associated with litigation are transaction costs. What types of costs do you include in the term "transaction costs"? Do [you] have any evidence or information to demonstrate how S. 1400 would reduce transaction costs?

Answer: The term "transaction costs" would include attorney fees for all parties involved in a claim, the costs involved in preparing a case for trial (which would include all the pretrial discovery), and the court costs involved in handling the case if it goes to trial. Simply because a case may not go to trial, or a case that goes to trial results in a verdict for the defendant, does not mean that there are not significant transaction costs. The expedited settlement procedure provided for in section 201 of S. 1400 should be a significant factor in reducing transaction costs. It will do so by providing an incentive for parties to accept fair offers of settlement and thereby cut back on much of the pretrial preparation and court time (which includes the attorneys' fees, expert witness fees, lost executive time preparing for court, and lost time and expenses of the plaintiff) that is spent in such cases.

5. You testified that the increased costs under the current product liability system are borne by consumers. Do you have any specific data to support this contention? For example, what percentage of the price of a product is attributable to liability costs? Does this data factor in the benefit of consumers being compensated for their injuries from defective products, or is it based just on the costs of products?

Answer: A significant amount of the costs of the product liability system are indirect costs that are impossible to quantify. These costs are reflected in useful products being discontinued, decisions not to develop new products or not to continue product research, and a fear to innovate. These costs are heavy burdens on the consumers who lose the opportunity to utilize new, safe and effective products. The 1988 Conference Board Report stated that half of the responding firms reported that they had discontinued product lines, 39% had decided not to introduce new product lines, and 25% had discontinued product research. Some manufacturers will shut down operations completely leading to a loss of jobs. All of this activity had a harmful effect on consumers. Concerning direct costs, the Institute for Civil Justice of the Rand Corporation concluded that in 1985 tort system transaction costs totalled $16 billion to $19 billion. A large part of these costs is undoubtedly passed on to consumers in the form of higher prices for goods and services. Regarding the percentage of the price of a product that is attributable to liability costs, I am unaware of any specific across-the-board data on the issue. One researcher, however, has estimated that at least 15% of the cost of a simple stepladder can be attributed to the liability system.

Senator **Bryan**. Thank you very much, Mr. Willkie.

In your prepared testimony, you indicate that competitiveness is the focus of your concern, and you cite the legal practices in Japan and western Europe. And I think all of us would acknowledge in this room that those are our principal economic competitors.

And then you go on to make some comparisons. For example, just to paraphrase you for a moment, you say judges determine liability and damages. There discovery is strictly limited. Awards for pain and suffering and punitive damages are not available, and there is no contingency fee arrangement to compensate lawyers. And you make the same general observation with some slight distinction with respect to our European competitors.

Are you suggesting that we ought to make those changes in the legal system as well here in this country?

Mr. **Willkie**. No, Senator, I am not. We are not advocating the abolition of punitive damages or contingent fee awards or other provisions which are not available under the laws of those countries.

The point I am attempting to make is that because the protection they afford their consumers is so radically smaller than is the case in this country, the disparity in the costs associated between our system and theirs is inordinately great, and we ought to find other means to reduce those costs.

Senator **Bryan**. I think most would agree with your observation that they afford their consumers less in the way of legal protection. Is that a value that we necessarily want to emulate? Setting aside for the moment the argument that changes in the American tort system may be necessary and we ought to do that, but in comparing the systems, aren't we talking about different cultures, different philosophies, a different value system? I am a little concerned about the comparison that because the Europeans are doing it this way and the Japanese that necessarily means that we ought to do that per se.

Mr. **Willkie**. Well, it is a factor for American business to consider, Senator. The Conference Board survey, which was conducted in 1988, and which I would respectfully urge to your attention, reports that half of the CEOs responding to the survey thought that their firm's competitiveness was adversely affected by the current state of our product liability laws.

Now, I must hasten to add that we are not urging the diminution of protection for the rights of injured parties. And I must say that the GAO report, to which Senator Hollings, the Chairman of this committee, referred, I think affords us much encouragement on this point because it reported that in very few of the cases surveyed would the injured parties' awards by reduced by the laws that are currently being considered by Congress, specifically S. 1400 and comparable legislation. So, that ought to provide some assurance to those who are concerned that this legislation might reduce the protections which are available to consumers.

Senator **Bryan**. And my last question would be what provisions in S. 1400 in your judgment expedite the orderly handling of these product liability cases. You mentioned dispute resolution, and I have read the legislation. But I am not quite sure what you have reference to. There is a provision, of course, for an offer of judgment, which is certainly provided at least in most state court systems. Where does S. 1400 improve upon that in your judgment?

Mr. WILLKIE. Well, it provides positive incentives under a uniform system to encourage parties to settle, to make a reasonable offer of settlement.

Senator BRYAN. Can I get you to be a little more specific? I know that certainly you make some part of the tort law uniform. I concede that, but you mentioned the alternative dispute resolution, the fact that maybe we can expedite. And I am not sure that I see that in the legislation, and perhaps I just overlooked it.

Mr. WILLKIE. It is a very complex proposal which is presented there—and I think it is intentionally complex—to protect the rights of consumers and to ensure the availability of legal services to aggrieved claimants. But it does provide positive incentives for settlement by allocating attorney's fees against a party which refuses to accept a reasonable offer of settlement with some substantial modifications. But that, plus the provision for positive incentives for arbitration, ought to provide more expeditious relief.

Senator BRYAN. Thank you. My time is up. I yield now to Senator Hollings.

The CHAIRMAN. Mr. Willkie, you have cited the attempted repair Conference Board report by the corporate heads themselves. However, I am sure you are familiar with the risk managers. The original Conference Board report surveyed 232 risk managers in 1987. They were asked how much the final prices of their products can be attributed to the costs of liability insurance. For two-thirds of the firms, the answer was 1 percent or less. Now, that's what the risk managers said.

And then, of course, the impartial GAO report made just last year stated—and I read there—"Large organizations spent an average of .3 percent of their annual revenues or budgets on liability insurance for 1985. The average increased to .6 percent in 1986." That's the GAO report.

Other than that political repair report they tried to make at the Conference Board, do you have any basis in fact to substantiate your statement that product liability is a cost problem?

You know the basis for this bill has moved. First they said it was fairness. Victor Schwartz gave an interview the other day, and he said first we used the word "fairness". Then we went to "insurance". And now this year the buzz word up here at the table is "competitiveness" with foreign competition.

What is the basis of your finding that it is going to reduce any costs whatsoever to federalize this?

Mr. WILLKIE. Well, on the point of competitiveness, I know that it is a concern of all of us.

The CHAIRMAN. I know about the concern. What is the fact?

Mr. WILLKIE. Well, if you look at the Conference Board survey, you and I, I guess, would have somewhat different characterizations of the 1988 Conference Board report.

With regard to the earlier risk managers' report, it is clear that the costs of this system have disproportionate effects on different industries, different companies. The pharmaceutical industry in particular bears a disproportionate percentage of the exposure under this system and I do not think that the costs of the system are distributed evenly throughout American industry. But I do think that we ought to give some credence to the Conference Board survey which included the comments of 550 chief executive officers of not only Fortune 2000 companies, but also smaller businesses which had foremost in their concerns the potential adverse impact of the current system on the marketability of their products.

The CHAIRMAN. Well, are you a member of the American Bar?

Mr. WILLKIE. Yes, sir.

The CHAIRMAN. The American Bar Association certainly is an impartial group of mostly, I can tell you, corporate lawyers. It cost to go there, and usually the companies will pay your way to get there.

I am reading from their executive report. Time and again they have come out against this particular measure. And at the end of the year, just a year ago, they found that "the liability insurance crisis of the mid-1980s was primarily a crisis of price and availability of commercial and professional liability insurance." And then a specific finding: "Existing data do not confirm the generalized claims of those who attribute the most recent hardening of liability insurance markets to flaws in the tort system."

Now, our distinguished colleague, the Senator from Missouri, said that the civil justice system was called into question. I do not know where he got that from, but that is not what the lawyers who are out there practicing law, and particularly on the corporate side, say. "Existing data do not confirm the generalized claims of those who attribute the most recent hardening of liability insurance markets to flaws in the tort system. Financial and statistical data currently collected and made available by the insurance industry do not justify proposals for a wide-scale tort reform."

What is your answer to that?

Mr. WILLKIE. Well, Mr. Chairman, I am sure you are aware that many members of the American Bar Association would emphatically disagree with that conclusion. ABA is a big house, and there are lots of different points of view in that. But there is clear, substantial evidence that insurance rates have risen dramatically as a consequence of the costs associated with this system, particularly in the last 15 years.

The CHAIRMAN. Well, we agree in that the problem's the cost of insurance, but not the cost of the product. And right to that particular point, on the cost of insurance, that is what we are trying to investigate at this committee level right now with respect to that cost of insurance and where the money is really going. I am glad to hear that answer.

Thank you, Mr. Chairman.

Senator BRYAN. We will now hear from Senator Gorton.

Senator GORTON. Mr. Willkie, you have emphasized competitiveness, and particularly international competitiveness, by reason of both the greater degree of uniformity and the lesser degree of severity of product liability rules in, say, Japan and in western Europe on American manufacturers. Yet, obviously, if a Japanese manufacturer markets a product in the United States, it is subject in the United States to legal action on the basis of the same rules as an American manufacturer. And presumably if an American manufacturer sells in Japan, more likely than not, that manufacturer will be sued in Japan under Japanese rules.

Under those circumstances, where is the competitive disadvantage to the American manufacturer?

Mr. WILLKIE. The competitive disadvantage to the American manufacturer is that it sells a much larger percentage of its products in the American market and unfortunately is not selling very many of its products in the Japanese market today, as Chairman Hollings and others frequently call properly to our attention.

If you had a Japanese firm which sold as high a percentage of its products in the United States as an American firm, then the disparity in the treatment of the two companies in their exposure would, of course, be substantially diminished. But that is not the way that international markets work.

And particularly when it is a matter of bringing innovative products to market, a foreign firm has the opportunity to test a new drug, a new consumer product, whatever, in a foreign market where its exposure under its laws is very much diminished and, once they have a relative degree of assurance on that score, is in a position then to come into the American market where American firms are reporting that they are unwilling to introduce new, innovative products because of advice that they may have some exposure that cannot yet be gauged.

Senator GORTON. Thank you.

In one of your answers to Senator Bryan, you attempted to comfort him with the thought, either quoting the GAO report or perhaps one of the other studies on this subject, that the passage of this legislation would not significantly lower damage awards in product liability litigation.

If that is true from the perspective of the manufacturer, what good is the legislation?

Mr. WILLKIE. Because the majority of the costs that we now see under our system are transaction costs, as well as the impossible to quantify indirect costs. Something is wrong with a system, Senator, where attorneys are more substantially compensated than injured parties, and that is what all the evidence now indicates.

Senator GORTON. So, it is your view that at least one of the most important considerations in this legislation, if not the most important consideration, would be the reduction of transaction costs.

Mr. WILLKIE. Yes, Senator.

Senator GORTON. Could you comment, since you will be gone when the representative of the General Accounting Office testifies, on either the conclusions or the significance of the GAO report?

Mr. WILLKIE. Yes. I think it is an interesting report. It certainly ought to be considered.

I think the most important conclusion that I took away from it was that in very few cases would awards to injured parties be reduced.

But I do think that there is much there that indicates the scope of the problem. What you see is that in some states punitive damages are quite frequent, maybe 33, 40 percent; in other states, extremely rare. In some cases the awards are much higher in some states than in others, and it certainly indicates that the cases that go to trial take a tremendous amount of time and that there are extraordinary transaction costs associated with those. It says that punitive damages are frequently overturned, but makes clear that the transaction costs associated with consideration on appeal are very substantial.

Senator GORTON. You brought up the question of punitive damages, which I did not mention in my opening statement. The State of Washington does not in most litigation permit punitive damages at all, and there are four or five other states that follow that no punitive damage rule.

Is there any indication in your mind that product safety or the other goals of a fault or non-fault based tort system are less adequately represented in States like Washington which have no punitive damages? Are products less safe there?

Mr. WILLKIE. I have no indication that they are. I'm not aware of that.

Senator GORTON. Thank you.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Gorton.

Senator Kasten?

Senator KASTEN. Mr. Chairman, thank you.

I understand, Mr. Willkie, that the American Bar Association, in fact, has supported a number of changes, but now denies that it prefer Federal reforms. It is my understanding from what I have read that the ABA prefers state-by-state changes.

And I am hopeful, Mr. Chairman, that if we do have another hearing, that we might have a representative of the ABA and also a representative of ATLA, the trial lawyers' group, because within the ABA the lawyers frequently differ with the trial lawyers. And on a given day the lawyers win, and on another day the trial lawyers win. And we have wording coming back and forth. And I think if we had them here—we have done this in the past—it would be helpful to the Committee.

But the ABA has been on a number of different kinds of issues, and the debate that we are having here in this committee is a debate that is taking place among the American Bar Association at every one of the meetings, at least the recent meetings, that I'm aware of.

Mr. Willkie, from your testimony it seems clear that you believe that the problem is national in scope and therefore ought to be addressed on the national level. A number of others believe that Federal intervention into product liability law is, in effect, inappropriate, an invasion of state sovereignty or states' rights.

I wonder if you could comment on why you and the administration believe we should enact a uniform national law that would, in effect, preempt state law.

Mr. WILLKIE. Well, we believe that federalism is an important concern, but we should not exalt federalism and the notion of states' rights to the exclusion of other legitimate concerns. Certainly the interstate commerce clause provides ample constitutional justification for such legislation, and clearly one of the intents of the Founders in crafting the interstate commerce clause and other provisions of the Constitution was to ensure that there was some, at least limited, Federal preemption in certain areas to protect and promote interstate commerce.

Today when very few products are not marketed on an interstate basis and where the nature of this problem is national in scope and where there are very strong policy considerations for introducing uniform principles at the national level, we think that that outweighs any particular concerns in the states' rights area.

Senator **Kasten**. One of the issues that you brought up in your written testimony that we have discussed here is the significant problems that businesses face under the current law regarding their inability to predict potential liability. If you are a crane manufacturer in Milwaukee, Wisconsin, and the crane backs up into a power line in Minnesota, one set of circumstances starts to happen. If the exact same accident happens in our other neighboring State of Illinois, another set of circumstances occur. In one case the crane manufacturer is held liable; in another, the person that employs the crane operator or trained the crane operator is held liable.

Without worrying about Minnesota or Illinois or Wisconsin law, I wonder if you could tell us about predictability, about the necessity to have some kind of understandable, predictable system in place so that we are able to, number one, insure against risk and, number two, to compete.

Mr. **Willkie**. Well, I think what we hear from the business community, what we see in the Conference Board survey of the 550 CEOs, and the other input that we have is that the concern is not with exposure in the ordinary case with regard to a defective product, but the unusual, exceptional case where the exposure may be tremendously great because of punitive damages or particular circumstances to a case which introduces a tremendous element of unpredictability.

If you have greater consistency, greater predictability, greater certainty, as to what the limits are, what the prevailing rules are in all 50 state jurisdictions, then it makes it much easier for CEOs for companies to plan because they know what their outside risk is. And, unfortunately, with a lot of new, innovative products, you cannot be certain what your exposure may be in the case that represents the one in a million circumstance.

Senator **Kasten**. I want you to talk just briefly about more than competitiveness—I think this is an issue that is growing in importance. When we first introduced legislation in 1981–1982, I do not think we understood the way we do now, Europe 1992 coming together and its uniform product liability standards. More importantly I do not think that we had the same understanding of competing with the Japanese, with the Koreans, with the Europeans that we do today. And we did not realize the impediment that product liability laws were becoming to our international trade and to our competitiveness here.

But I think also we should talk about safety, the issue that the Senator from Missouri raised or the Bendectin Dow Chemical situation. There are a number of areas in which we see now that important products that are safer and are better are being kept off the market. These decisions are being made because the legal counsel or someone in the company says if we put this product on the market we are in danger of lawsuits. Also, this growing body of law allows the 1990 improved product to be used an evidence that the 1980 product was unsafe.

Could you talk very briefly about the product safety and product improvement part of the problems as you see them from your perspective at the Department of Commerce?

Mr. WILLKIE. Yes. Unfortunately, what we are hearing is that a number of products are either being discontinued or not being introduced particularly in the safety area because of that one in a million case where companies are worried about something that goes beyond strict product liability, something which might be characterized as absolute liability. And we see Spaulding, for example, has discontinued manufacturing protective sportswear.

Numerous pharmaceutical products are either not being brought to market or have been discontinued. In the case of Bendectin, you had 1,200 physicians complaining about the company's discontinuance of the product, but the transaction and the insurance costs associated with defending what was almost invariably successful litigation was so tremendous that the company could not sustain the losses it was incurring on the product. And there are numerous other examples of that kind.

Senator KASTEN. Mr. Chairman, thank you.

Senator BRYAN. Thank you very much, Senator Kasten.

Senator Danforth.

Senator DANFORTH. Mr. Willkie, I would like you first to focus on the particular problems of small business and the effect of the existing system on small business. Oftentimes when the statement is made, well, this is bad for business, we have the impression that here is some huge General Motors type operation. And, well, what's that to us?

But a few years ago, there was a White House conference on small business. And the people attending the White House Conference on Small Business were asked to list their top priorities for things that we can fix to help them. And the first thing on their list was product liability reform. Now, that was several years ago. I was wondering if you have a sense now about the effect of the status quo on small business and whether the sense of urgency that was expressed years ago at the White House Conference on Small Business is shared today.

Mr. WILLKIE. Senator, I think you raise a very good point. The Conference Board survey reported that two-thirds of the CEOs saw this problem as getting worse, not better. This was conducted in 1988.

Most firms, 80 percent, reported that it had a moderate or major impact on their business, but the small businesses were the ones who seemed to be even more alarmed about it than the Fortune 500 firms. Of the small firms participating in the survey, 59 percent saw the product liability system as having a major impact on their firm. They feel this more acutely than the large firms. It is a tremendous cost for Ford or GM, the people that we might ordinarily hear from in Washington, but the little guy is paying even more of a price because his potential exposure represents a much greater percentage of his firm's net worth, if you will, in an individual case than would be the case for, say, a major auto manufacturer.

Senator DANFORTH. So, in effect, the little guy cannot self-insure. The little guy cannot say, well, this is a risk of doing business because he is risking perhaps everything on a product where he would be exposed.

Mr. WILLKIE. I think that is a very good point, Senator. We know that many of the major firms have moved towards self-insurance. The little guys cannot afford to do that.

Senator DANFORTH. And this is where the job growth opportunity is, as I understand it. It is in small business rather than in large business where the creation of new jobs is most promising.

Mr. WILLKIE. That is certainly what numbers in recent years have indicated.

Senator DANFORTH. Now, I would like to turn to the issue of innovative products. You have spoken of this several times in your testimony. You said in your prepared testimony that firms reported that they had discontinued—let's see—50 percent discontinued product lines; 39 percent had decided not to introduce new product lines; 25 percent had discontinued research.

And then on page 9 of your testimony you say that:

> Product liability concerns have chilled research and development by industry and the academic community. Some reports, including the Conference Boards, indicate that universities are shying away from licensing patents to small manufacturers because of their fear that, as the originators of the idea upon which a product was manufactured, they will become the "deep pocket" if there is litigation involving the product.

I just wonder if you could expand on the effect on universities, small business the licensing of patents, the discontinuation of research and development, and what this says about America's ability to lead in the world of innovation in the future.

Mr. WILLKIE. Well, those are all good points. I think that one thing that I would add is the comment recently made by one CEO that while his foreign competitors were spending money on R&D and product innovation, he was expending greater funds on his legal costs. As we have heard, it is not just the plaintiff's bar, it's the defense bar, the tremendous costs associated there.

Senator DANFORTH. It's not just the cost of insurance, it's the chilling effect, isn't it, the fact that if something is new, it is suspect? It is the Monsanto story. We do not know. We are sure it's a good product, but we are also sure there will be lawsuits.

Mr. WILLKIE. Well, I think anyone that you speak to in these industries, Ford, General Motors, Monsanto, whatever, will tell you that even the best research that we can engage in with a new product, we still know that there is no absolute guarantee in every circumstance in which that product is brought to market, not that the injured party should not be compensated under a strict liability system. They should be, but the costs of those individual incidents are so unpredictable, so hard to gauge, that it inordinately increases the transaction costs associated with them. And that is particularly true, of course, with the new and untested product, untested in the marketplace.

Senator DANFORTH. It is sometimes said that the tort system today is a lottery. What is the meaning of that statement? Why would it be said that the civil justice system, the tort system, today amounts to a lottery?

Mr. **Willkie**. Well, if you look at the GAO report, you see that results vary a great deal from one state to the next. A party may be much more likely to recover in one state than the next.

When I was in private practice in New York City representing certain major American manufacturers, I can tell you the single most important part of our practice at the beginning of litigation was venue practice. Where is this case going to be heard? Is it going to be heard in Manhattan, or is it going to be heard in upstate New York somewhere. The single most important consideration at the outset of litigation was where the case was going to be heard. The circumstances are the same. You have an injured party with relative merit or lack of merit to his claims. Presumably the claims on the merits should not be determined by where the case is heard, and yet that is an absolutely critical consideration.

The problem can be diminished by the introduction of these uniform standards.

Senator **Danforth**. Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Senator Danforth.

Senator Rockefeller, who was here at the very beginning of this hearing but had to leave to weigh in on behalf of some aspect of the clean air legislation that was of particular interest to him, joins us. He is a cosponsor of this legislation. Let me give him an opportunity to make whatever opening statement he cares to or to examine the witness, Mr. Willkie, who is the General Counsel of the Department of Commerce.

OPENING STATEMENT BY SENATOR ROCKEFELLER

Senator **Rockefeller**. Well, you are more than gracious, and I am extremely embarrassed. In fact, Chairman Hollings, the clean air bill is in the process of repealing the methanol bill that Senator Danforth and others on this committee and yourself worked so hard to get. And I was in a lovely meeting over there for about an hour. I am very embarrassed not to be at this one.

Thank you, Mr. Chairman, for holding this hearing today on product liability reform. The importance of this issue demands a fresh and in-depth look. I am confident that you will bring these qualities to the hearing process.

As one of the four main supporters of the Product Liability Reform Act of 1989, I think my position is well known. Some may be curious what prompted me to take a leading role on this issue.

My commitment to product liability reform grows out of my abiding concern about the ability of this Nation to maintain our world leadership position. For this country to successfully compete with other Nations and to maintain our standard of living, we have a long list of improvements to undertake. We need to reduce our federal deficit; increase our savings rate; vastly improve the math and science skills of our children; devote more resources to research and development; and, encourage more long term investment by American companies.

In my view, a uniform, federal product liability law is and must be pursued as an integral part of our country's effort to achieve economic competitiveness in the international marketplace.

We are paying a dear price in the global marketplace for the confusing patchwork of constantly changing product liability laws that currently exists. The fear of potential liability is robbing our industries and our people of the will to compete and is severely curtailing the celebrated innovative spirit of Americans.

Research and development directors at leading American universities have told the Congress about how they are retreating from and cutting back on potentially vital research due to the threat of product liability lawsuits.

There are numerous examples of American companies, because they are faced with uncertain product liability costs, who are abandoning their existing product lines and/or not entering new product lines. Experience shows that when an American manufacturer abandons a product line, it does not take long for foreign companies to step in to take over the job.

Coming from the state of West Virginia, I have seen communities devastated from the changes in the global market—changes that have caused basic industries, in their search for economic survival, to leave the State and take jobs with them. At first, this assault seemed limited to the more traditional smokestack industries. We prayed that this would not be so bad, and that we could shift our strength into new high technology areas, in the hope of replacing traditional jobs.

There are no absolute protections against foreign competitors; however, there are steps that we can take as elected officials and as a Nation to stop the export of American companies and American jobs.

This product liability reform bill, S. 1400, is one of the steps we can take. I urge the members of the Committee to read the bill. I think they will be pleasantly surprised to see how fair and balanced it is. In the past, this committee has considered reform bills that would take away the rights of victims to full compensation. S. 1400 does not diminish the rights of victims of product accidents to fair compensation.

I congratulate the Chairman on the excellent witnesses he has chosen and I look forward to hearing from them. I urge this Committee to move expeditiously to a markup of S. 1400, and I ask all of my colleagues and all of the interested parties to give the bill and its goals your fair, fresh, and serious attention. We must respond to the enormous economic and social challenges of this decade and the next century, and I would argue that this legislation is one of the crucial steps we must take immediately as part of that response. 1990 should be the year that Congress passes a product liability reform bill.

This country is extraordinary in the way that we shoot ourselves in the feet.

And this is not the unreasonable bill that a lot of people are suspecting. This is not a bill which contemplates putting caps on punitive damages. This is not a bill that caps what lawyers can make. This is not the psychology that has been operating at times in the past. And, in fact, I would say very clearly whenever I have spoken to business groups, I say do not look on this bill as a chance to load up. This is reasonable. We are taking a new approach on this thing of moderation, of something that can work which is practical, which in many ways I would have to say I think is consumer oriented in terms of expediting the process to bring claims to people not in three or four years as averages now in that 96 percent of the cases are settled, but in a much quicker time.

That was my opening statement. I will not try to examine the witness, and I appreciate the Chairman's courtesy in recognizing me.

Senator **BRYAN**. Thank you very much.

We will hear from Senator McCain.

Senator **McCAIN**. Thank you, Mr. Chairman.

Mr. Willkie, I am not a member of the ABA.

So, perhaps we could discuss this issue just for a moment in layman's terms.

Let's take a typical product liability case. Obviously a plaintiff sues because of some defect in a product that he has acquired. How much of a settlement goes to the lawyer and how much goes to the plaintiff generally speaking?

Mr. **WILLKIE**. The Rand Corporation Institute for Civil Justice did a survey in 1985, and I know that they are doing some additional work in this regard. But they found that I believe it was $14 billion to $16 billion in the cases they surveyed were awarded to injured parties, and $16 billion to $19 billion were absorbed in transaction costs, which obviously is not all to the plaintiff's bar although a significant percentage of it is. The defense bar is well compensated as well.

Senator **McCAIN**. Well, let's get back to non-lawyer terms. The lawyer takes the case on a contingency basis generally speaking. Is that right?

Mr. **WILLKIE**. Yes, Senator.

Senator **McCAIN**. What is the general rule—and I know it varies from state to state, but generally speaking, what percentage of the award would go to the lawyer under that kind of a fee arrangement?

Mr. **WILLKIE**. The standard rule in the past has been one-third. In some jurisdictions, it is a bit higher than that now.

Senator **McCAIN**. And his fee is the costs of the trial and the costs of secretarial and staff assistance. Is that also taken from the judgment, or is that part of his fee?

Mr. **WILLKIE**. That is part of his fee, as I understand it. It may vary from one state to the next, but that's the general rule.

Senator **McCAIN**. So, roughly 30 percent is a normal contingency fee.

Mr. **WILLKIE**. Yes, Senator.

Senator **McCAIN**. I can certainly understand why the ABA would resist any change in that situation.

In fact, you may know more than I do. In a recent agent orange case which was settled with the chemical companies, an incredible amount of that money will never find its way to the Vietnam veterans who were victims of agent orange. It will go to the lawyers who represented them to the tune of, I think, $20 million or $30 million I believe for that case.

So, I guess my question to you is, in your view, is an inordinate amount of money going to the lawyer or is it going to the injured party in these cases?

Mr. **Willkie**. Well, we are not up here recommending limitations on contingency fees, and I do not think that there would be sufficient political support for that if we were.

I would say this. If you have a system which provides for contingency fees, which is to ensure that indigent or financially pressed potentially injured parties may obtain counsel in cases where the outcome is uncertain—it is certainly a reasonable principle—then it only makes sense for that principle to operate in a situation where the rules that are going to be applied in the cases of such litigation are clear, consistent, uniform, predictable.

The combination of a contingency fee system and radically different state laws with unpredictable results from one state to the next is what contributes to this extraordinary and inordinate expenditure associated with transaction costs.

Senator **McCain**. Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Senator McCain.

Senator Pressler, also a cosponsor of the legislation, joins us. He has not had an opportunity to make an opening statement. I would tender him that opportunity to do so now if he would like to and ask any question of Mr. Willkie.

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. Thank you very much, Mr. Chairman. Thank you very much for your courtesy.

Mr. Chairman, thank you for calling this hearing on product liability reform. Many members of the Commerce Committee have demonstrated their concern for this issue through their support for product liability reform legislation over the years. S. 1400 is cosponsored by half of this committee. I support this legislation and look forward to its passage this year.

There has been a product liability crisis in this country for many years now. Art Kroetch of Phillip, South Dakota, visited me in my office yesterday to explain how the cost of product liability insurance affects him. He pays twice as much each year for product liability insurance as he spends on Research and Development for his manufacturing company, Scotchman Industries. I thought that was ridiculous until I learned that the average for the country is more like seven times as much spent on liability insurance as for R&D.

Opponents of this legislation often raise the issue of states' rights. But I think it is important to note that the South Dakota state legislature passed a resolution this year urging passage of a uniform national product liability law. At least in my state, the legislature is willing to give up some of its prerogatives in this area in order to achieve a better nationwide system.

I have been particularly interested in the area of joint and several liability reform. This bill includes a provision correcting some of the inequities in that doctrine. It is a good bill that will improve the business climate in this country and our competitive status in world trade.

Mr. Chairman, thanks again for scheduling this hearing. I hope we can quickly report this bill to the full Senate.

Let me just add that I think this is an essential hearing. I know that this particular group of witnesses cannot address some of my concerns, but over the years I have found that there have been some phony public foundations created by trial lawyers or FELA lawyers who have come into my state and other states and have claimed to be representing safety. And quite by accident my staff found out that one of these foundations was completely financed by one law firm, and another had received $50,000 from another law firm. And Reader's Digest recently wrote an article and cited some of that information.

But I think that there are some very unhealthy things being done by the trial lawyers and by the FELA bar, and I intend to continue to work to expose them.

I understand that those forces plan to make independent expenditures in some campaigns this year disguising themselves under other names, under the guise of safety and so forth.

Also there is the issue of bundling. I think we all read a "Wall Street Journal" article recently in which 80 trial lawyers contributed to one candidate in one election. I am against bundling if it is done by business or trial lawyers, either one. And I have been told by some of the labor unions that they are absolutely embarrassed by some of the tactics that are used in this political fight.

So, I just wish to state that I hope we do have the trial lawyers here in a future hearing, Mr. Chairman, I think it is very important that we understand the forces that oppose this type of legislation, the forces that cause agent orange settlements to go mainly to lawyers and not to victims. I think the American people want a change. We are going to identify those forces that oppose this, and I hope that the forces that oppose it call themselves what they are which they did not do in the case of the foundations that came into my state. But the people of my state found out who they were, and Reader's Digest did, and the Wall Street Journal did, and I think that that's important for everybody to know.

Mr. Chairman, I have no questions.

Senator **Bryan**. Senator Rockefeller has asked to be recognized for an additional question. I would yield to him for that purpose.

Senator **Rockefeller**. Just a quick one, Mr. Willkie.

Certain people in the administration have indicated in the past that they would like to see amendments to this bill, in other words, what I would call loading up on. And my question to you is, is the administration willing to accept S. 1400 as it is?

Mr. **Willkie**. We think that this is an excellent bill that would substantially improve the current state of the law. We have no legislation drafted. I can assure you of that, Senator. Obviously, we will be very interested in the outcome of this hearing and other hearings, and I am sure various people will want to consider amendments at a later stage in the legislative process. But I can assure you I do not have any amendments in my hip pocket.

Senator **Rockefeller**. Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Senator Rockefeller.

Chairman Hollings had a question to ask, and I will give the rest of the members of the subcommittee an opportunity to ask additional questions if they wish to do so, although that is not required. And I will waive any additional questions that I have.

Senator Hollings.

The CHAIRMAN. Thank you very much, Mr. Chairman.

I am distressed when we talk about lawyers and lawyers' fees. Senator, we just had the product liability study by the GAO, and I read therefrom:

> Plaintiffs' attorneys: In the cases studied, all of which went to verdict, about one-half of the plaintiffs' attorneys received no fee. Defendants pay their attorneys on an hourly basis plus expenses. Unlike plaintiffs' attorneys, almost all defendants' attorneys, 98 percent, received fees. According to calculations derived from a survey conducted by Insurance Services Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs while every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents.

As the witness has just attested to, but we bring it into focus.

Specifically, Mr. Willkie, you continually refer to the CEOs, the CEOs, the CEOs. How about the injured parties? How many injured parties has the Department of Commerce interviewed or had a survey of. For example, the Pinto cases where dozens were just burned up with a defective gas tank, whereas Ford Motor Company could have spent $11—that is the direct proof—and could have corrected that before they put it on the market and caused all those deaths?

There were over 5,000. The Dalkon shield cases, billions of dollars in verdicts there, over 5,000 injured and dead from the Dalkon shield, a defective product.

Now, the truth of the matter is product liability does promote the health of consumers in America—you, me and everybody else. It puts them on notice. It does not keep any products that cannot stand just regular tests.

My senior colleague, Senator Thurmond, has lived 87 years with none of those products on the market, and I hope I can catch up with him some day.

We are all living now in spite of all of those wonderful products that have been kept off the market.

How many injured parties, rather than the CEOs, has the Department of Commerce surveyed?

Mr. WILLKIE. Mr. Chairman, we have not conducted any surveys in my tenure. We have looked at all the literature from a variety of sources on this issue, but we have not conducted our own survey. Obviously, I have made much use of the Conference Board report because I think it gives ample support to the proposition that we are arguing for.

But let me make this clear. I am not opposed to the strict product liability system. I am all for the strict product liability system, and I think that injured parties ought to be compensated. The GAO report indicates that Federal legislation of this character would not diminish the awards in nearly all instances to injured parties if these reforms were introduced. And I would hate to see that happen.

So, we are for this legislation because we think it is limited. It is moderate. It provides uniformity, predictability and consistency which would all be essential to reducing transaction costs.

But there are many business executives who tell us frankly we do not think this legislation goes far enough. We are not sure we can get excited about it because we do not think it goes far enough.

So, we think that this is a balanced approach. There is protection for the rights of consumers in the legislation with the statute of limitations provision which we see as pro-injured party specifically, a very specific pro-plaintiff provision, and the alternative dispute resolution provision ought to ensure that injured parties get compensated more quickly than is frequently now the case.

The **Chairman**. Once again you have quoted business executives.

Bottom line, on that decision to be made in your practice whether to try a case upstate New York or down in Manhattan, is the national Congress more likened in your mind to Manhattan or to upstate New York?

Mr. **Willkie**. I'm sorry. Is the national——

The **Chairman**. Congress and their particular attitude in treatment of things. I could use the word "liberal". Are they more liberal or more conservative? Are they more likely to be Manhattan, or are they more likely to be upstate New York? What kind of tort law do you think this Congress will favor—liberal or conservative?

Mr. **Willkie**. I think that this Congress or any subsequent Congress in enacting product liability legislation will ensure that the rights of consumers are adequately protected.

The **Chairman**. Well, I know about that, but are they going to be more like Manhattan?

You understand the question because you said that was the chief consideration, more time was spent on that in your practice. Now, do you liken this Congress more to Manhattan or more to upstate New York?

Mr. **Willkie**. Well, with all due respect, Mr. Chairman, I hesitate to get drawn into comparing apples and oranges.

The **Chairman**. Well, you were in the business. That's what you said on product liability and how the cases and where the verdicts were to be had, and that is what we are really talking about.

Are we going to be—use President Havel's word, "responsibility"—more responsible in the national Congress than we are in the state legislatures?

Mr. **Willkie**. We are all for legislative reform——

The **Chairman**. You do not answer the question. I know what you are for.

Are we more responsible up here?

I do not happen to think so. I know what our state legislature will do. That is why I'm asking the question. I know what the majority of the states are going to do. But I know what this Congress does when it comes to liberal measures, and that is what I have tried to advise and counsel my business leaders. If there is a frying pan, you are going into the fire itself, because this crowd in Congress is far more liberal than any state legislature I know of. It is going to be like Manhattan, not upstate New York.

Mr. **Willkie**. Might I just respond very briefly?

Senator **Bryan**. Certainly, Mr. Willkie.

Mr. **Willkie**. I just say that the Federal proposal we would see as enhancing, as being consistent with efforts at reform at the state level. We are not looking for total preemption by the Federal Government. We just think that these uniform national principles would be a useful complement to the reform that has been undertaken at the state level.

The CHAIRMAN. More like Manhattan or more like upstate New York?

You will not get to that, yet you said that was your measure when you were out there practicing, and that was the principal measure and concern you had.

Senator BRYAN. Let me tender the opportunity to anyone of the cosponsors here to my right if they would like to ask an additional question. Senator Kasten, then we will hear from Senator Danforth.

Senator KASTEN. Mr. Chairman, first of all, I would like to address the question that the Senator from West Virginia, Senator Rockefeller, brought up. As the author of this measure, it is my intention to discourage amendments in the committee. You and I and others in private have gotten together and discussed that. It is not my intention to add, for example, a fault-based standard or other kinds of amendments which the administration at different times has said it supports and which at different times I have supported.

My hope is that, procedurally, we will move through possibly one more hearing, then have a markup in committee, then any amendments, either softening amendments or hardening amendments, if you will, would be subject to debate on the floor. It seems to me that these questions, if we were able to amend this bill, either to harden or softening, would be revisited on the floor anyway. So, for us to go through these debates on a number of the amendments, including some that the administration has said that they favor, I think would double our work.

It is my strong hope that, working with the Senator from West Virginia as the chief majority cosponsor, we would avoid amendments here except those that could be agreed on unanimously. We would take S. 1400 is essentially its current form to the floor. And at that point we would address some questions that have been raised.

Mr. Willkie, I want to go back to the same GAO report. A subheading of the report is "Attorney's fees were a large percentage of total payments." And it says plaintiffs' attorneys are usually paid on a contingency fee basis. Those who were paid received a fee on the average of 35 percent of their clients' recoveries.

When people do not receive a fee, that does not mean that there were no attorneys' fees in my view. When the attorneys do not receive a fee, it means that they did not win the case. But in order to defend the case, there were tremendous transaction costs on behalf of, let's say, the product seller or the product manufacturer, and society as a whole lost. A safe product was proved to be safe, and it cost a lot of money in transaction costs in the process of proving that that product is safe.

So, the point here is that it is not only trial lawyers that are costing money. It is overall transaction costs and time. There are summaries in here about how long these cases take. And the point is the clock is ticking, and the meter is running on both sides of the table, if you will, and it is a waste of money for our society to not have a system in which injured consumers can be compensated efficiently. That is the point.

But the fact is attorneys' fees were a large percentage of total payments. There is no question about that, and the Senator from

Arizona is right. In many, many cases large amounts of money are, in effect, being diverted for transaction costs that ought to be either saved by our society or ought to be going to the injured consumer.

Senator **Bryan**. Thank you very much.

Senator Danforth, I believe you had a question or a comment.

Senator **Danforth**. Yes, I do. Thank you, Mr. Chairman.

The words "transaction costs" might be lost to the layman. What is meant by that term?

Mr. **Willkie**. It includes, but is not limited to, fees paid to lawyers. You also have significant in-house costs associated with transaction costs. Many businessmen report that they spend a lot of time getting ready for cases, cases which more often than not are not tried, but the pretrial process is extremely expensive. Most cases are settled one way or another prior to trial, but the discovery process in our system can involve very substantial depositions, interrogatories, discovery.

Senator **Danforth**. Well, as I understand it, transaction costs are not only fees paid to plaintiffs' lawyers, which are often contingent fees, but also fees paid to the defense lawyers, which are usually fixed fees and court costs. Right?

Mr. **Willkie**. Yes, Senator.

Senator **Danforth**. And when you add all of that up, it is believed to be, according to the Rand Corporation, more than what goes to the injured person. So, what we are saying that as far as the public is concerned, for every dollar that is spent in the present civil justice system, which is supposed to help the consumer, less than 50 percent, less than 50 cents, finds its way into the pocket of the consumer. Isn't that right?

Mr. **Willkie**. Yes.

Senator **Danforth**. And the rest just goes to the lawyers or goes to the courts or goes to someplace other than the consumers.

Now, on the question of forum shopping, upstate New York versus New York City, my understanding of what you said was that the present system is given to forum shopping. And that's the only point you made.

Mr. **Willkie**. Correct.

Senator **Danforth**. And that one thing that parties want is predictability. One thing that manufacturers want is predictability. Often I have had business people say to me about anything government does, look, just tell us what the rules are. Don't give us an unpredictable situation. Don't make us play a game where the rules are constantly changing or where they are different in one place than in another place.

And that was my understanding. You are arguing for greater uniformity rather than a system which varies all over the place depending on what court you are in, what judge you have, what forum you have. Is that correct?

Mr. **Willkie**. Correct.

Senator **Danforth**. Thank you.

Senator **Bryan**. Senator McCain?

Senator **McCain**. No questions.

Senator **Bryan**. Mr. Willkie, this issue has lost none of its controversial nature over the past decade. We thank you very much for your testimony. And I will ask that you respond to any further questions that members of this subcommittee have who have been here today and those who may not have had an opportunity, and we will hold the record open for that purpose. We thank you very much.

Our next witness this morning will be Mr. Joseph F. Delfico. Mr. Delfico is the Director of Income Security Issues, Human Resources Division of the General Accounting Office, and much reference has been made to the study performed by that office. So, we will hear from Mr. Delfico next.

Mr. Delfico, welcome to the committee. I will give you an opportunity to get yourself situated there. When you are prepared, please begin.

STATEMENT OF JOSEPH F. DELFICO, DIRECTOR, INCOME SECURITY ISSUES, HUMAN RESOURCES DIVISION, GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY DR. SUSAN ARNOLD, PROJECT DIRECTOR

Mr. **Delfico**. Thank you, Mr. Chairman.

With me today is Dr. Susan Arnold, who was the project director for our GAO study.

Senator **Bryan**. Dr. Arnold. Is that A-r-n-o-l-d?

Mr. **Delfico**. Yes.

Senator **Bryan**. Dr. Arnold, nice to have you with us.

Mr. **Delfico**. With your permission, I would like to submit the full testimony for the record and give you a very brief summary.

Senator **Bryan**. We appreciate it. Your entire testimony will be made a part of the record. We will hear your summary or highlight that you want to present to us now.

Mr. **Delfico**. Thank you, Mr. Chairman.

I am pleased to be here today to present our views on the product liability system.

Between the mid-1970s and the mid-1980s product liability lawsuits filed in Federal courts grew dramatically. In 1986 we reported that the so-called litigation explosion was, in fact, accounted for by a sharp rise in Federal filings related to one product, asbestos. A recent report indicates that product liability filings unrelated to asbestos have declined in the past few years.

Nevertheless, 41 states responded to concerns about the tort system by passing various reforms between 1986 and 1988. These reforms would tend to reverse the trends toward larger awards and expanded liability standards.

I would like to turn now to a recent report on verdicts in five states, Arizona, Massachusetts, Missouri, North Dakota and South Carolina.

We found that damage awards in general were strongly associated with the severity of injury. Million dollar awards were only given when injury had resulted in either permanent disability or death. Moreover, closed claim studies have consistently found that individuals with the most severe injuries are under-compensated for their economic losses.

Similarly, punitive damage awards were highly correlated with the size of compensatory damages. Some states have enacted caps to limit the size of punitive damage awards, but few of these awards in the cases we studied would have exceeded these caps had they been applicable.

More importantly, when used, appeals and post-trial settlement negotiations reduced the size of most extremely large awards and eliminated many punitive damage awards.

Across all states, payments were 43 percent less than the total amount awarded, and all million dollar punitive damages awards were eliminated or reduced substantially.

We also found that in most cases judges and juries considered defendants' fault when deciding liability. In fact, we found that liability was usually based on the traditional standard of negligence.

Our findings are consistent with other studies showing that it takes considerable time and cost to resolve civil claims. We do not know, however, whether the benefits of the judicial process balance its substantial administrative costs.

Time to verdict ranged from one and a quarter years in South Carolina to over three and a half years in Massachusetts, and appeals added 10 months on the average to case resolution. In appealed cases, defense costs were double the costs in cases that were not appealed, and plaintiffs paid roughly 35 percent of their award to attorneys.

The length of time required to resolve cases can result in defendants paying considerable amounts where pre-judgment interest is awarded. In Massachusetts, for example, pre-judgment interest is required by statute and accounted for over 30 percent of the total amount awarded across claims.

You also asked for our views on Federal tort reform. Despite considerable reform activity at the state level, tort reform proponents continue to call for Federal reforms. They contend that the variation in state laws hinder interstate commerce, and other problems persist.

Since our efforts focused on verdicts and case resolution and not on how these verdicts affected commerce and competitiveness, we cannot comment on that aspect of the tort reform argument. Of course, the pros and cons of Federal reform are highly dependent on specifics of various legislative proposals. Moreover, the effects of enacted reforms are likely to be difficult to measure, particularly when considering the effects on future plaintiffs.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions you might have at this time.

[The statement and questions and answers follow:]

STATEMENT OF JOSEPH F. DELFICO, DIRECTOR, INCOME SECURITY ISSUES, GAO

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present our findings on how the tort system works with regard to product liability. Important changes have been occurring in this area over the past few decades. Juries have increased the size of awards and the extent of the increase and its causes have been matters of considerable debate. Largely through case law, liability has been expanded by varying degrees in different states, creating greater variation among state laws.

There has been a continuing, sometimes heated, debate on whether these changes are symptoms of a malfunctioning tort system. Some have argued that awards are excessive and defendants are being held liable in unreasonable situations. They believe that the courts have deemphasized the goal of deterrence in favor of compensating victims regardless of whether the defendants caused the injury. Others have defended the changes as redressing prior restrictions on plaintiffs' ability to recover damages. Both sides have valid and reasonable points but tend to adopt extreme positions when making their arguments, perhaps mirroring the adversarial nature of litigation.

Between the mid-1970s and the mid-1980s, the number of product liability lawsuits filed in federal court grew dramatically. In

1986, we reported that the so-called "litigation explosion" was, in fact, largely accounted for by a sharp rise in federal filings on one product--asbestos. According to data provided by the Administrative Office of the U.S. Courts, the number of product liability filings increased from about 1,600 in 1974 to over 13,000 in 1986. When asbestos and cases related to two other products were eliminated, however, the increase was much more gradual.[1] A recent article indicates that product liability filings unrelated to asbestos have declined in the last few years.[2]

Between 1986 and 1988, 41 states responded to concerns about the tort system by passing some type of reform that would affect product liability cases. Most reforms affected the tort system in general; a few have specifically targeted perceived problems concerning product liability standards. Enacted reforms would tend to reverse the trends toward larger awards and expanded liability standards by limiting the size of defendants' payments and the circumstances under which they are held liable.

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[1] The two products were the Dalkon Shield, an intrauterine birth control device, and Bendectin, a drug to reduce morning sickness.

[2] Henderson, J.A. and Eisenberg, T. "The Quiet Revolution in Product Liability: An Empirical Study of Legal Change," UCLA Law Review, Vol. 37, (1990), p. 158.

My testimony is based primarily on our recent report on verdicts and case resolution in five states: Arizona, Massachusetts, Missouri, North Dakota, and South Carolina.[3]

Our objectives were to determine

- the percentage of cases in which defendants were found liable and the amounts of compensatory and punitive damage awards,
- the incidence of posttrial activities and actual payments made to plaintiffs after verdict,
- the size of awards and payments relative to plaintiffs' economic losses,
- the extent to which the standards of negligence and strict liability were used to determine liability,
- the time and cost of litigation, and

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[3] Product Liability: Verdicts and Case Resolution in Five States (GAO/HRD-89-99, Sept. 29, 1989). I also rely on supplemental analyses of the data we collected and our earlier report on the growth in product liability filings, Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned (GAO/HRD-88-36BR, Jan. 28, 1988).

- the possible impact of proposed federal product liability legislation on (1) the outcomes of court cases and (2) the variations in laws across states.

The five states were selected from among states and large urban areas where product liability cases could be readily identified. We collected data on over 300 cases that were resolved through a judge or jury trial in federal and state courts between 1983 and 1985--a time period during which problems were alleged to exist. Because the cases are not a statistically representative sample, our findings cannot be generalized to other states. Attachment I identifies the state courts covered and sources used to identify product liability cases.

AWARDS STRONGLY ASSOCIATED WITH INJURY SEVERITY

The compensatory damage component of awards was strongly associated with the severity of the injury and, presumably, the plaintiff's underlying economic losses (see attachment II). Million-dollar awards were given only when the injury had resulted in either permanent disability or death. Moreover, closed-claim studies have consistently found that individuals with the most severe injuries are undercompensated for their economic losses.

Punitive damage awards were highly correlated with the size of compensatory damages. Some states have enacted caps (ranging from 1 to 4 times the compensatory damages) to limit the size of punitive damage awards, but few punitive damage awards in the cases we studied would have exceeded those caps had they been applicable.

When used, appeals and posttrial settlement negotiations reduced the size of most extremely large awards and eliminated many punitive damage awards. Across all cases, payments were 43 percent less than the total amount awarded. In 71 percent of the cases with million-dollar awards, posttrial processes resulted in final payments less than the initial verdict.

Appellate courts appear to have found many of the punitive damage awards they reviewed to be unjustified. The courts ruled on 12 of the 23 punitive damage awards made in the cases studied, reversing 9 and vacating and remanding 3 for retrial. All million-dollar punitive damage awards were eliminated or reduced dramatically. Of the 9 cases in which the punitive damage awards were reversed, in only 1 case was the compensatory damage award also reversed. These reversals primarily reflect lower court errors in awarding punitive damages, not in their liability decisions.

LIABILITY BASED ON DEFENDANTS ACTIONS

Some have alleged that juries award damages without considering the defendants' conduct. Although liability standards have been changing, in most cases we reviewed, liability was based on the traditional standard of negligence. In about 27 percent of cases, defendants were held liable under strict liability.[4] Even in those cases, defendants would have been allowed to present evidence to show that their actions were consistent with state-of-the-art technology; and juries could have then taken this evidence into account when determining whether defendants were liable. Some cases outside the scope of our study have been noted, however, where appellate courts held defendants liable even though their actions were in accord with the state-of-the-art at the time of product manufacture.

TIME AND COSTS SUBSTANTIAL

Our findings were consistent with previous studies showing that it took considerable cost and time to resolve civil claims that go to trial.[5] Because the benefits of the judicial process are difficult to quantify, however, we cannot determine the degree to which these benefits balance its substantial administrative costs.

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[4] Under strict liability, defendants are liable if the product was defective and this defect made the product unreasonably dangerous and caused the injury. The plaintiff in a strict liability action need not prove that the defendant was negligent.

[5] Product liability is a type of civil case.

In the cases we reviewed, more than half of total payments by defendants went toward plaintiffs' attorneys fees and defense costs. And defense costs in appealed cases were double those in cases that were not appealed.

Average time to verdict varied from 1-1/4 years in South Carolina to over 3-1/2 years in Massachusetts. Appeals added 10 months on average to case resolution. Across states, plaintiffs had to wait 2-1/2 years, on the average, for a verdict and even longer to receive compensation.

The time required to resolve cases not only delays compensation but also can result in defendants paying substantial prejudgment interest. In Massachusetts, for instance, where payment of prejudgment interest is statutorily required, such interest accounted for 32 percent of all moneys awarded.[6]

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[6] Among the five states, only Massachusetts and North Dakota provide that prejudgment interest, which accrues from the date of filing the claim, be added to the final judgment.

OBSERVATIONS ON REFORM AT THE FEDERAL LEVEL

Even with considerable state reform activity, tort reform proponents have continued to call for federal reform, contending that problems with the tort system persist. They argue that state reforms have resulted in more variation in state laws.

The pros and cons of federal tort reforms will, of course, depend on the specifics of various legislative proposals. Because of data unavailability and measurement problems, the effects of enacted reforms are likely to be difficult to measure.

The primary rationale for federal tort reform is to introduce uniform standards across states. In the states we reviewed, about 70 percent of defendants were from outside the state in which their case was tried. We found that federal reforms, if sufficiently clear, would undoubtedly reduce variation across states (see attachment III). The value of reforms that do not promote uniformity in the bases used to determine liability, however, would be questionable.

Over the years, plaintiffs have made significant gains in compensation through the tort system. Deliberations that focus on burdens that defendants may face should seek to strike the difficult balance between providing sufficient incentive to prevent injury and provide fair compensation for those who are injured through the fault of another.

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Mr. Chairman, this concludes my statement. I would be happy to answer any questions you might have.

Cases Covered and Sources Used in State Courts

State	Number of cases		Extent of state coverage		Sources used to identify cases	Cases tried in courts not included in this study[a]
	Federal courts	State courts	Number of Courts	Percentage of state population		
AZ	3	56	9 of 15 Circuit Courts	88	Jury verdict reporters	All claims under $500; any claims between $500 and $2,500[b] tried by Justice of the Peace
MA	44	22	All 14 Superior Courts	100	Records of the Office of the Chief Administrative Justice and the Court of Appeals	All claims under $7,500, which are tried in District Court, Municipal Court, or Housing Court
MO	52	56	All 44 Judicial Circuits	100	Jury verdict reporters; records of the Office of State Courts Administrator; "Missouri Appellate Court Opinion Summary"	None
ND	3	13	All 53 District Courts	100	Private study	Any claims under $10,000[b] tried in County Court
SC	37	19	26 of 46 Circuit	78	Private study	Any claims under $1,000[b] tried in

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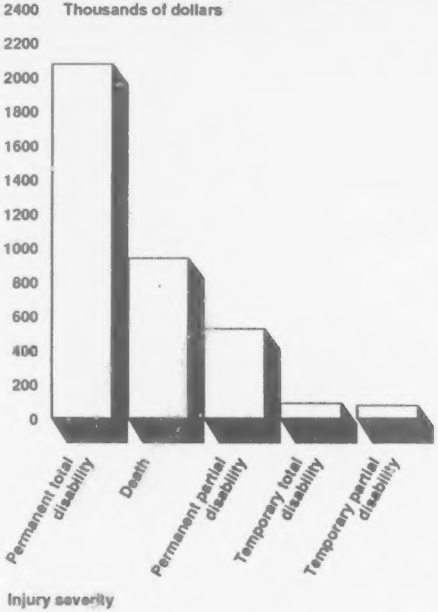
[a] In all states but Missouri, product liability cases with small claims could be heard in courts other than the trial courts we examined. Our sources did not cover these courts with small claims.

[b] Cases with claims of $2,000 or more could also be tried in the courts we studied.

Average Compensatory Award Varies with Injury Severity



Number of cases in each category are: Permanent total = 9; Death = 17; Permanent partial = 70; Temporary total = 4; and Temporary partial = 15.

Product Liability Laws: 1988
Reforms for Five States Studied Versus S. 1400 and H.R. 1115

Aspect of the law	AZ	MA	MD	ND	SC	S. 1400 as introduced	H.R. 1115 cleared by Committee[b]
State-of-the art evidence allowed in strict liability cases	Yes (all actions)	a	Yes (warning cases)	No	Yes (design & warning cases)	*	Yes (all actions
Rule of joint & several liability modified	Yes	No	Yes	Yes	No	Yes	*
Comparative negligence made available under negligence theory	Yes	Yes	Yes	Yes	No	*	*
Comparative negligence made availabe under strict liability theory	No	a	Yes	Yes	No	*	*
Caps on awards set	No	No	No	No	No	*	*
Clear & convincing evidence required for punitive damages	Yes	No	No	Yes	Yes	Yes	Yes
Collateral source rule modified	No	No	Yes	Yes	No	Yes	Yes
Statute of limitations for most actions (in years)[c]	2	3	5	6	3	2	2

Legend
Yes = areas in which state has enacted a reform or S.1400 and H.R.1115 would reform
No = areas in which state has not enacted a reform. Traditional law or rule prevails.
* = bill does not address this issue; state law would control
[a] Not applicable
[b] As cleared by the House Commerce Committee in June 1988.
[c] Only state law in South Carolina was modified by recent reforms.

1. IN YOUR RESEARCH OF THE CURRENT PRODUCT LIABILITY SYSTEM, HAVE YOU FOUND ANY EVIDENCE THAT WOULD SUPPORT THE ARGUMENT THAT THE CURRENT TORT SYSTEM HAS LED TO AN INCREASE IN TRANSACTION COSTS? WHAT ARE THE MAJOR FACTORS THAT CONTRIBUTE TO THE LEVEL OF TRANSACTION COSTS? DO YOU BELIEVE THAT S. 1400 WOULD REDUCE TRANSACTION COSTS IN PRODUCT LIABILITY SUITS?

In our review, we did not collect data over time to assess whether the current tort system has led to an increase in transaction costs. We reviewed a 1987 study by the Rand Corporation, however, that reported that between 1980 and 1985, the annual growth rate for the amount of tort litigation was about 3 or 4 percent. Expenditures for this litigation grew at about 6 percent for automobile-related litigation and about 15 percent for other tort claims, including product liability.[1] Although the literature is replete with general concerns about the costs of litigation, we did not find any other research documenting trends in transaction costs associated with the current tort system.

The major factor affecting the level of transaction costs is the length of litigation. As we reported, cases we reviewed took years to process--almost 2-1/2 years to move from filing of a complaint to the beginning of the trial. On average, appealed cases took 10 more months. In our review, we noted two possible reasons for lengthy litigation in product liability cases. First, the law has been evolving in many states, which may increase the complexity of the legal decisionmaking process. Breaking new ground and establishing new precedents, for instance, take more time than cases where the law is clearer and requires little deliberation or interpretation. Second, both plaintiffs and defendants have little incentive to cut corners. Although plaintiffs have incentives to expedite the process so that they can receive compensation, their attorneys may want to invest substantial resources in developing cases to deter manufacturers from making harmful products. Defendants may prefer not to settle cases to deter further suits over the same product. Pretrial discovery--a time-consuming and expensive feature of litigation--therefore becomes an important part of product liability suits for both parties.

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[1] Hensler, Deborah R. et al, Trends in Tort Litigation: The Story Behind the Statistics, Rand Corporation, Institute for Civil Justice, Santa Monica, CA, 1987, p.25.

We believe that S. 1400 is unlikely to reduce transactions costs in product liability suits. For cases that are litigated, the procedural features of the tort system would not be changed by the bill. It is also not clear that the bill provides strong incentives for alternative dispute resolution, which could cut litigation costs. Moreover, the alternative dispute resolution mechanisms that may be used are left to the discretion of the states. If these mechanisms are not binding, then they may add to rather than substitute for litigation. If this happened, costs could actually increase.

2. YOUR STUDY FOUND THAT PRODUCT LIABILITY CASES WERE QUITE TIME CONSUMING:

   A. COULD YOU PLEASE IDENTIFY THE SPECIFIC FACTORS THAT MAKE THESE CASES TIME CONSUMING?

   B. ARE THERE ANY BENEFITS TO THE JUDICIAL PROCESS FOR HAVING PROLONGATED CASES? FOR EXAMPLE, IS LENGTHY LITIGATION EVER JUSTIFIED IN ORDER TO INSURE AN ACCURATE RECORD IN A COMPLICATED CASE?

   C. WHAT ARE THE DISADVANTAGES FOR HAVING LENGTHY LITIGATION?

   D. DO YOU BELIEVE S. 1400 WOULD REDUCE LITIGATION TIME IN PRODUCT LIABILITY CASES?

A. Specific factors that make these cases time-consuming are the steps required in the legal process. In the vast majority of cases we reviewed, we noted that defendants often used the maximum amount of time legally required. Delays caused by defendants were also common. In most cases, manufacturers have little incentive to settle cases, as we said in response to the first question, although some may be concerned about adverse publicity regarding their products.

In the typical case in our review, the defense was first granted 30 days to respond to a petition. The defense typically argued, at the end of the 30 day period, that the plaintiff did not use the product or that negligence was the cause, at least in part, of the harm. This began the legal process known as discovery, in which the burden was on the plaintiff to build a record by collecting data on product design, specifications, and other (often proprietary) information from defendants. The preparation of interrogatories--testimonial evidence from eyewitnesses, expert witnesses, and others--was another lengthy process needed for the record. We also found frequent motions to extend and delay court dates.

B. In any case, a complete and accurate record would be necessary to ensure a fair legal outcome. In this sense, lengthy litigation and its attendant costs might be justified. Generally, however, we believe litigation should be shorter, and as a result, we would expect lower overhead costs and higher net compensation for injured parties. In our report, we concluded that we cannot determine the degree to which the benefits of the judicial process balance substantial administrative costs. We also noted that benefits thought to accrue from the judicial process include providing incentives for product safety. The Rand Corporation noted in its 1987 study that "there is no ready measure of the inherent reasonableness of the system's transaction costs. Especially when we focus on the tort system's goal of deterrence, we might encounter circumstances in which we find very high transactions costs acceptable." [2]

C. There are two primary disadvantages of lengthy litigation. First, as we have already discussed, time greatly increases costs. Second, protracted litigation means that injured parties wait longer for compensation.

D. S. 1400 will probably not reduce litigation time in product liability cases because discovery and other legal processes would not be affected by the bill. And, because the effect of S. 1400 on alternative dispute resolutions is unclear, we cannot predict the extent to which lengthy litigation could be avoided if product liability reform were enacted.

3. YOUR STUDY INDICATED THAT THE DATA NEEDED TO GIVE A COMPLETE EVALUATION OF THE EFFECTS OF TORT REFORMS IS NOT READILY AVAILABLE. DO YOU HAVE ANY RECOMMENDATIONS ON HOW THE RELEVANT AND NECESSARY DATA MIGHT BE COLLECTED? IF SO, WHAT IS YOUR PROJECTION OF THE LENGTH OF TIME IT WOULD TAKE TO COLLECT SUCH DATA?

When we began our review, we found that with the exception of ongoing work at the Rand Corporation, very little data had been gathered in any systematic way about the outcomes of tort reforms. According to researchers at Rand, neither critics nor defenders of the civil justice system have much solid evidence to support their views. In fact, the legal system is notorious for its fragmentation and dearth of records on finances and workloads. Our review confirmed serious inadequacies in available databases, methodological difficulties in designing rigorous studies, and an overall lack of empirical evidence that impede efforts to evaluate the effects of tort reforms.

For a comprehensive assessment of research prospects in this area, we refer you to the following Rand Corporation publications: (1) Hensler, Deborah R., Researching Civil Justice: Problems and Pitfalls, Summer 1988; (2) Reuter, Peter, The Economic Consequences of Expanded Corporate Liability: An Exploratory Study, November 1988; and (3) Carroll, Stephen J., Assessing the Effects of Tort Reforms, 1987.

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[2] Ibid., p. 25.

Senator **Bryan**. Thank you very much, Mr. Delfico.

Let me ask you a question. Have you had a chance to examine S. 1400?

Mr. **Delfico**. Very briefly, Mr. Chairman.

Senator **Bryan**. Assuming for sake of argument that S. 1400 in its entirety without amendment of any kind were enacted, in your judgment to what extent, if any, would the results of your survey of those five states have been affected, changed in any manner?

Mr. **Delfico**. To some degree, some of the punitive damages may have been affected, but by and large there was very little effect that we could see based on the cases we studied in the five states.

Let me say that the five states are not representative of the U.S., though. So, to give a definitive answer on that question, we would have to take a look at other states.

Senator **Bryan**. Let me sidestep that first question for a moment, and then go to the next question before coming back.

The five states that were selected—how were they selected? Although your report makes it clear that you do not argue that one can extrapolate from that data necessarily to the national result, do you have any reason to believe that it would not be representative of a national survey. Is there something about those five states that suggested to you during the course of your study that the conclusions that you have reached might be aberrations insofar as a broader based national study?

Mr. **Delfico**. The only thing I could say about the states and their representativeness is that we do not have any very large industrial states in our sample such as New York, Texas, Michigan, etc. We do consider, though, data from Rand studies that include California, Cook County, Illinois. Most of our major findings appear to agree with the Rand studies.

So, to answer your question in a roundabout way, I feel comfortable with what we have. They provide us with insight into what might be happening in the country, and they do provide a variety of population groups and state laws. We feel that because of this variety, we are able to shed some light on this debate.

Without sounding defensive about the size of the sample, as you probably know, Mr. Chairman, there are not many in-depth studies in this area. We found other studies but have not referred to them in our testimony. We took two years to do our work and feel that the data we have is second to none as far as quality is concerned. We are pretty comfortable with it.

Senator **Bryan**. Mr. Delfico, I am not trying to put words in your mouth, but if I understand your comment, you are suggesting to the committee that there is no reason to believe that the survey of five that you did would necessarily reach a different conclusion than if you surveyed other states, another five states, for example, that were selected on the same basis.

Mr. **Delfico**. I think I could buy that.

Senator **Bryan**. Now, again, coming back to the first question that I asked you, having read S. 1400, can you be a little bit more specific looking at those five states? Give us your best assessment. You have done an intensive study. You folks do an objective job. You're not supposed to be weighing in for or against the adversaries in this issue. What changes would S. 1400 have produced?

Mr. **Delfico**. The changes would have been minimal. We took a look at S. 1400 shortly before we came here, and it did not look like it would have any major impact on the results of our study.

Senator **Bryan**. To the extent that it would have a minimal impact—and I would certainly invite Ms. Arnold to respond if you feel that she may be able to provide some insight to the subcommittee—where would the changes be? You say that they are minimal. That by definition indicates there is some change. Could you focus in?

Dr. **Arnold**. We are not really clear what would happen in the area of punitive damages if you raised the standard of evidence required. But I think that if raising the standard of evidence eliminated some of those awards, that is probably the area where you would see the biggest impact.

In terms of the section of the bill dealing with product sellers, we are not as convinced that it would have a major effect. They were held more often liable on negligence than on other standards or theories of liability, and they dropped out of the cases at about the same rate as other types of defendants. So, we are not sure that it is going to have as big an impact in that area as you might have expected.

Senator **Bryan**. Mr. Willkie in his testimony made reference to his support of the principle of strict liability. I have never been a product liability lawyer, either as a plaintiff's counsel or defense counsel, but strict liability to me means liability without fault, without proving negligence, dating back to an old case, if I recall from law school, of *Rylands* v. *Fletcher*.

Now, if strict liability were adopted, doesn't that mean that in every instance in which the plaintiff could prove a causal relationship between the use of the product and an injury, doesn't the plaintiff recover? Wouldn't that increase the likelihood of the plaintiff's recovery as opposed to your findings in which the plaintiff recovered—I cannot recall the exact percentage, but it looked like it was about half, 45, 50 percent. And correct me if I misstate that.

Mr. **Delfico**. It's 43 percent.

Senator **Bryan**. Thank you.

Mr. **Delfico**. To answer your question about strict liability, we found, surprisingly, that negligence was the standard used in most of the cases.

Senator **Bryan**. And that is certainly a different standard than strict liability.

Mr. **Delfico**. It is a tougher standard from the plaintiff's standpoint.

Senator **Bryan**. Essentially am I correct, Mr. Delfico? If you can prove that you used a product and you got injured as a result of using that product, you do not have to prove negligence if strict liability is the standard.

Mr. **Delfico**. Yes.

Senator **Bryan**. The concept of fault is removed from the legal equation, as I recall.

Mr. **Delfico**. That is my understanding.

Senator **Bryan**. Tell us a little bit about your findings insofar as punitive damages. There has been some indication from your comment that punitive damage awards may have been changed. How frequently in those cases that you examined were punitive damages awarded, and what was your finding in terms of the excessive amount? And were they reduced or remanded for retrial?

Mr. DELFICO. In 12 cases where punitive damages were awarded and subsequently appealed, all were either remanded or reversed, as far as the punitive damages awards are concerned. I am not sure how many of the cases had punitive damages awarded. Do you remember?

Dr. ARNOLD. Yes. There were roughly 20 percent in three of the states, or 23 total out of 136.

Senator BRYAN. So, it would be a little more than one in five.

Dr. ARNOLD. Right.

Senator BRYAN. You first of all have compensatory damages for what I would consider the medical expenses, loss of income, future loss of income based upon the nature of the disability? Then you have a category of pain and suffering, which I have always understood to be non-economic. And third, you have the punitive damage category.

I know my time is up, but if you could tell us what you found with respect to the compensatory damage, how much of the recovery was attributed to that in those cases, how much was non-economic, pain and suffering, and how much was punitive in the cases that you looked at.

Mr. DELFICO. We were not able to separate the noneconomic and economic damages in the data base. So, we categorized the combination as compensatory damages.

Senator BRYAN. So, that would include the pain and suffering as well then?

Mr. DELFICO. Yes.

Referring to your other question, in the cases that we looked at, roughly 43 percent of the initial awards were reversed. In no cases, except for one, was the compensatory damage award reversed. Most of the reversals were punitive damages.

Dr. ARNOLD. About 25 percent of all the money that was awarded was for punitive damages.

Senator BRYAN. I see. Thank you.

I know my time is up, but I am tempted to ask just one more question.

You made a statement on page 8 in your testimony. "Because of data unavailability and measurement problems, the effects of enacted reforms are likely to be difficult to measure."

What can we use? The plaintiffs make their arguments here and the consumer federation groups and others who have opposed this, and manufacturers and retailers and small business people have articulated their concerns. What is the measuring stick that we ought to use here in this committee?

We have had a lot of anecdotal evidence, and I am sure much of it is validated. But what is the measurement? Is there anything out there that gives us the data base to guide us, those of us who have not weighed in for or against this legislation at this point?

Mr. DELFICO. We have had a very difficult time gathering data. That is one of the reasons we went to these five states—they had data that was easily accessible. As it stands right now, it is very difficult to measure the impacts of any reforms because the data bases are not there. Data are not recorded in a way you would like to see them kept.

I would suggest that one of the better ways of doing this would be to take a look at closed claim studies done by insurance companies. They are few and far between, but when these studies are done, they are fairly accurate and to some degree are representative of what is happening.

They also include pre-trial settlement data, which we did not get into.

Senator BRYAN. Mr. Delfico, Ms. Arnold, I thank you.

And I apologize to the members of the committee here. I defer now to the Chairman, Senator Hollings.

The CHAIRMAN. Mr. Delfico, I am delighted to see you and I am delighted I have never seen you before because some would say I had gotten this report up, where the truth is the Honorable James J. Florio made the request. And he was the chairman of the committee over on the House side and the author of a product liability bill. In fact, I didn't know it was going on. I might have tried to get to see you to make sure you covered certain points.

The request by Governor Florio and your report were a pleasant surprise to me. After all of the study and everything else, Mr. Delfico and Dr. Arnold both have testified if you pass this ipso facto in one minute, it would have a minimal effect. We have heard these lurid descriptions about the tort system is a lottery, and poor researchers and wonderful corporate heads are not able to put on products, and a lot of other nonsense. But here in an objective study it says the effects of the bill would be minimal, that the verdicts generally are based on negligence, and juries are not runaway.

And you found also, as we found at this committee, that the data bases are not there. Particularly, we have not found the profit and loss statements of the major insurance casualty and liability carriers. We have tried to get them in this committee, but we have not been able to. And that is why you have bills in to obtain it, including the distinguished Senator from West Virginia trying to get this information, on the one hand.

On the other hand, let me just take my moment to emphasize what you have stated. You see there is a forum out there for those injured by defective products, and it is in the several states. You find in one state, mine, a minimal time, and in another state, Massachusetts, it is three and a half years.

Now, I know from the conclusion that you have made that half of the plaintiffs' attorneys will receive no fees, whereas 98 percent of the defendants' attorneys do receive compensation. If I have four or five good, important product liability cases in my office, and the defendants are dragging me out three or four years, then I have really angry clients on the one hand—why haven't we done anything because they are hurting, they are poor and they need the money and they need the help whether or not there is liability. And on the other hand, I have been carrying all the expenses, investigating, interrogatories. But if you are a defendant's lawyer, the secretary just punches out question number 52, and you send your client another $500 bill, and depositions, another $500 bill.

And it is on up, up and away. And if you can keep the case going and lose the witnesses and the patience of the plaintiff in three and a half years, you win it by delay. And that is the thing that I am very, very fearful of.

The jurisdictions are really coming now more to my particular practice in South Carolina where you have to get those cases and get them out and get them tried, and you are not allowed to go from upstate to downstate.

So, I have not had a chance to study it in detail, but what I have seen of the report, we thank you for it. We find it objective, and limited because, as you indicate, a lot of this information is unavailable.

Did you get information on the profit and loss of the insurance companies themselves, the large insurance carriers?

Mr. DELFICO. Not in this study, no, we didn't. We didn't attempt to do that in this study.

The CHAIRMAN. But you did find that the awards were consistent with the severity of the injuries and in many instances, severe injuries are under-compensated; all punitive damage verdicts of a million dollars were either reduced or eliminated; and most of the liability was based on negligence.

Mr. DELFICO. That's correct.

The CHAIRMAN. I thank you, sir.

Senator BRYAN. Thank you very much, Mr. Chairman.

Senator Gorton?

Senator GORTON. In looking at the five states in this study, did you find any significant or measurable variance among the states of the law in those five states as it relates to product liability?

Mr. DELFICO. I do not think we found a significant variance. We did find a variance in the amount of awards, the average amount of awards, by state. We traced that back to the type of injury that was being awarded. The states with the lowest awards, for example, South Carolina, did not have injuries as severe as other states. The variation among states in awards correlated more with the degree of injury than difference in the laws or the way the states ran their tort system.

Senator GORTON. So, you did not find any significant variance among these five states in the rough amount of awards for roughly comparable injuries?

Mr. DELFICO. On the average, yes.

Senator GORTON. You would say that you did not.

Mr. DELFICO. We did not. Right.

Dr. ARNOLD. To the extent that we could test for that.

Senator GORTON. Why that caveat? Was your sampling too small to be able to be confident in that?

Dr. ARNOLD. No. It is just that there are so many factors that can influence the size of awards. We tried to gather the economic loss information, but were unable to do that. So, we had to perform gross comparisons.

Senator GORTON. Now, you did find a variance in the time that it took from the date of injury or date of lawsuit until the date of settlement that was rather dramatic.

Mr. Delfico. Yes. There were variances, and I think they also correlated with the kind of injury that was being considered at the time.

Senator Gorton. So, you would not say there was a significant difference in a wrongful death action between South Carolina and Massachusetts?

Dr. Arnold. I would say that Massachusetts would have taken longer.

Mr. Delfico. Yes.

Dr. Arnold. It did take longer than the other four states.

Senator Gorton. So, maybe two categories, Massachusetts over here by itself with the other four states fairly similar.

Dr. Arnold. Massachusetts was the most extreme outlier I would say. South Carolina, of course, took much less time and, as Mr. Delfico said, we believe it would be correlated with the severity of the injury.

Senator Gorton. I want to go back to my first question. At least in a study of these five states, you did not find any significant lack of uniformity with respect to the actual law relating to product liability.

Dr. Arnold. We did find that the standards varied across states. For example, Massachusetts did not have strict liability per se. They used breach of implied warranty as a substitute and believe it gives the same type of protection or coverage as strict liability.

We found that the other four states did have strict liability. There were some differences in the definitions, but we did not find a significant difference.

Senator Gorton. But you do not believe that there would be a significant difference in result from one state to another in a similar kind of case by reason of the differing laws in those states?

Mr. Delfico. On the whole—and I must admit that these are gross averages—we would feel that way, yes. There would not be a significant difference among the states.

Senator Gorton. Did your study include any attempt to determine what percentage of the ultimate awards to victims was taken up by attorneys' fees and other transaction costs?

Mr. Delfico. Yes. I think as we mentioned in our report, 35 percent of plaintiff's awards were for attorneys' fees. On the average plaintiffs paid 35 percent for attorneys' fees. To look at it another way, when defendants lost a case, 50 percent of the defendants' payments to the plaintiff went for attorneys' fees, their attorneys' fees and the plaintiffs' fees combined. So, in both cases they were——

Senator Gorton. And when defendants won?

Mr. Delfico. When the defendants won, I think they paid roughly the same as the plaintiff, around 30 percent for attorney's fees.

Senator Gorton. So, in a successful product liability action, the attorney's fees costs alone are roughly 50 percent of the award when you distribute them across all sides of the litigation.

Mr. Delfico. That is our finding, yes.

Senator Gorton. And attorneys' fees are not the only transaction costs, are they?

Mr. Delfico. That's right.

Senator GORTON. Do you have any estimate as to what the average transaction costs in a product liability action would be?

Mr. DELFICO. No, we don't have that estimate. The average transaction cost includes attorneys' fees plus other costs. We just focused on the attorneys' fees.

Senator GORTON. Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Gorton.

Senator Kasten.

Senator KASTEN. Mr. Chairman, thank you.

Let me just follow up if I can. If I understood Senator Gorton's question, he asked if there was significant variation in the law, and finally you got down to the fact that there was a significant difference in the law. In fact, you only have one state, Missouri, which is a state that would basically have so-called strict liability. In Missouri you have 56 percent of plaintiff victories based on strict liability.

And Massachusetts does not recognize strict liability. So, inclusion of any Massachusetts cases it seems to me skews the overall average.

Now, South Carolina is somewhere halfway in between. You have six out of the 24 cases that you surveyed could have been based on strict liability. You are all over the map here.

There is a significant difference in the laws state by state by state. Is there not?

Mr. DELFICO. I think the question was with regard to, if I am not mistaken, the awards, whether or not there would——

Senator KASTEN. We can go back and look at the record, but I'll ask the question myself. Is there a significant difference in the law state by state that you surveyed? Yes or no.

Mr. DELFICO. It depends on what you mean by significant. I do not want to quibble on the terms.

Senator KASTEN. Well, you are quibbling. Is there a significant difference state by state in the laws of the five states that you surveyed?

Mr. DELFICO. There is a difference in the laws, yes.

Senator KASTEN. Specifically does one state have a different kind of liability, strict liability versus something other than strict liability?

Mr. DELFICO. The case that you brought up of Massachusetts I think is a case in point. Dr. Arnold talked about that one.

Dr. ARNOLD. Let me just say that four of the five states have strict liability. They use strict liability. They recognize it. We found that in Missouri decisions were based more often on strict liability than in the other three states that have strict liability. So, the use of the law may vary in terms of what they are bringing the cases on or basing it on, but the laws are similar in that they all have strict liability available.

Senator KASTEN. Would you agree with me that inclusion of only one state, the State of Missouri, which has a relatively high percentage of verdicts based on strict liability, is going to skew this survey, particularly when you add Massachusetts which has zero?

In other words, of the states, you only have one state that has a relatively high percentage of cases based on strict liability, Missouri. The other states, going all the way down, stepping with Massachusetts way over on this end, the other states are somewhere in between.

My point is that by including only one state, Missouri, with strict liability, I think you have skewed the results of this survey. And let me go further and then you can respond.

You state yourself that the report does not include any of the large industrial states that reform advocates have identified as problem states in the area of product liability. You also say that the report cannot be generalized to other states.

The point here is that you picked only one strict liability state, Missouri, you yourself say it cannot be generalized to other states. Isn't it possible that you didn't find the problem that others have found in this area because you were not looking in the right place or because you specifically excluded certain places or included certain places such as Massachusetts?

Mr. **Delfico**. As I mentioned earlier, the selection of the states were driven primarily by the data. We did not look at states that would either favor or disfavor one particular form of liability. We looked at Massachusetts and Missouri. We selected them because of their data availability. The data systems were there. So, we were able to make an analysis of it.

Susan, did you want to address the other part of the question?

Dr. **Arnold**. Well, I just wanted to say that four of the five states, when we were going into the states before we had our results, had strict liability. Given the literature and the arguments that have been made, we anticipated finding strict liability to be the predominant standard in all of those states. We only found it to be the predominant standard used in one of the states which we could not have known beforehand.

The Rand Corporation has done work in California and Cook County Illinois. They were surprised that in states where there was strict liability, negligence was the predominant standard.

So, I do not know if you went to California or Cook County or Texas or New York that you would find strict liability to be the predominant standard either because you would have expected that given the arguments in four of the five states we went to.

Senator **Kasten**. In your statement you talk about the incidence and size of punitive damages. And you state that they varied considerably from state to state. You also found that, when awarded, punitive damages constituted nearly 25 percent of the total recovery. You also found that appellate courts reversed or sent back to the trial court every punitive damage award that was reviewed. Now, doesn't that support the argument that punitive damages are being awarded unpredictably and arbitrarily?

I was disappointed that you stated that in certain cases that the system works because every time it was reviewed, it was changed or modified. But that is not the point. The point is what is happening at the trial level. Clearly you cannot be suggesting that our system is good because every time it gets reviewed, the award is modified. The problem is the initial decision.

Why don't you explain why you assume that successful appeals of erroneous decisions are just as good as appropriate damage awards at the trial? It would seem to me that appropriate damage awards at the trial would be better and result in lower transaction costs.

Mr. **Delfico**. To start off with, I would agree with you. We would feel that appropriate damages should be awarded at the time of the trial—we would prefer this over a long, extended appeals process that goes on, based on our data, for 10 months or so.

What we were pointing out in our report was that unjustified punitive damage awards were overturned, and that the process albeit inefficient, was working. We were not saying that it is the most efficient and the least costly process in the world, but we pointed out that punitive damages that were unjustified were reversed.

Senator **Kasten**. But it is significant, I think, that every single award that you surveyed, had to go through this whole process. What we are talking about here is excessive transaction costs.

Thank you, Mr. Chairman.

Senator **Bryan**. Thank you, Senator Kasten.

Senator Rockefeller?

Senator **Rockefeller**. Thank you, Mr. Chairman.

I will ask you if you disagree with any of the points that are in your report.

You say that cases take years to resolve——

Mr. **Delfico**. That's correct.

Senator **Rockefeller** [continuing]. And cost plaintiffs one-third of their recovery in legal fees.

Mr. **Delfico**. That's correct.

Senator **Rockefeller**. That juries "often incorrectly award punitive damages."

Mr. **Delfico**. That's correct.

Senator **Rockefeller**. That in cases where appeals are heard, over half of all judgments for plaintiffs are reversed or remanded to the trial court.

Mr. **Delfico**. That's correct.

Senator **Rockefeller**. That attempting to reform the product liability system at the state level has not made the governing law more uniform, but instead has "increased the variation of laws across the states."

Mr. **Delfico**. That's correct.

Senator **Rockefeller**. And that the provisions for expedited settlements "might reduce the time and cost for these product liability cases."

Mr. **Delfico**. That's right.

Senator **Rockefeller**. A second question, Mr. Chairman.

In my judgment the report minimizes the potential impact of product liability reform by stating that the proposals would "potentially have affected only a minority of the cases that we studied." But doesn't the report in fact, show that several of the proposed reforms would have had a significant effect on cases, to wit, that in nearly half of all cases where punitive damages were awarded, the law required proof by only "a preponderance of the evidence"?

Mr. **Delfico**. That's what we said, yes.

Senator **Rockefeller**. And that 42 percent of the cases studied were work related cases where the collateral source provision may have been relevant, page 64.

Mr. **Delfico**. That's correct.

Senator ROCKEFELLER. And isn't it true also that the report did not consider other impacts of S. 1400 which I think were very important? For example, the drug-alcohol defense, the time limitation in bringing suit. You did not consider that, did you?

Mr. DELFICO. That's correct.

Senator ROCKEFELLER. Isn't it also a fact that the reforms would directly affect only a minority of cases completely consistent with the goals underlying S. 1400?

Mr. DELFICO. Yes.

Senator ROCKEFELLER. My final point—our point is not to revamp product liability law, but only to correct some of the more extreme and unfair results that arise from the current situation.

Mr. DELFICO. Yes, that is my understanding Senator.

Senator ROCKEFELLER. I thank the Chair.

Senator BRYAN. Senator Hollings.

The CHAIRMAN. Mr. Chairman, if the committee please, I think in addition to not being able to get all the information we needed from the insurance companies, we are all off on product liability. Let me just put in the record these cases when we talk about punitive damages because I have been in the product liability field. I have tried antitrust cases. I have never seen such punitive damages.

If you really want to see some punitive damages decisions, you look at *Red Hill Development Company* v. *Tenneco* where there a $608.4 million award against Tenneco, $258.4 million compensatory, and $350 million punitive.

Maryland Deposit Insurance Fund Corporation v. *Seidel* in Maryland state court, a breach of fiduciary duty, $65 million compensatory and $322 million punitive.

State of South Dakota v. *Kansas City Southern Industries.* These are states and corporations, not individuals that have to get a lawyer on a percentage basis, a contingent fee. In the State of South Dakota, it was $219.2 million compensatory and $25 million punitive.

Technical Equities Litigation, investment fraud cases, a verdict of $153.8 million with $6.8 million compensatory and $147 million punitive. These are all cases in the last two or three years.

Riddle v. *Southmark Corporation,* San Diego, California, $130.8 million, which was $2.8 million compensatory and $128 million punitive, a breach of contract by the former president of a subsidiary against the parent corporation.

And *FDIC* v. *WR Grace,* $25 million compensatory, $75 million punitive, fraud in obtaining a loan.

Rajala v. *Allied Corporation,* July 1987, breach of fiduciary duty and contract, $10.3 million compensatory, $60 million punitive.

Conlan v. *Wells Fargo Bank,* $10 million compensatory, $50 million punitive.

Robinson v. *Texas Commerce Bank-McAllen,* $9.3 million compensatory, $50 million punitive damages.

These are all contract fraud cases, not product liability cases, and are giving our product liability cases in accordance with your finding a bad reputation. And it has to be brought out. Now, those are just recent decisions. I have a glossary now of pages and pages, but I cited, of course, the decision of *Pennzoil* v. *Texaco* which was

$12 billion, as you well know. These are the kind of verdicts that you see in the headlines.

In fact, I was glad at least to see Mr. Willkie come for the Department. They had an assistant attorney general previously. He came up with a bunch of newspaper clippings. That was absolutely embarrassing, and they don't bring the assistant attorney general any longer with newspaper clippings.

Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Mr. Chairman.

I defer now to Senator Kasten for another question.

Senator **Kasten**. Mr. Chairman, I simply want to make a comment.

I do not agree with the selection of states. I do not think that you had an adequate sampling of the larger industrial states. We are going to have a gentleman from Ohio here later today, and I think that it is important that we recognize that there is a significant difference from state to state, particularly with regard to strict liability, as we have discussed.

Notwithstanding all of that, I believe that this report confirms many of the points made by those of us that are trying to enact product liability reform. Specifically, cases takes years to resolve and they cost plaintiffs one-third of their recovery in legal fees, page 54.

Juries often incorrectly award punitive damages, page 63.

That in cases where appeals are heard, over half of all judgments for plaintiffs are reversed or remanded to the trial court, page 38.

That attempting to reform the product liability at the state level has not made the governing law more uniform, but instead has "increased the variation of laws across states." That is on page 57.

That the provisions for expedited settlement "might reduce the time and cost for these product liability cases." That is on page 68 in a note.

I believe, notwithstanding the fact that the sample in my opinion was not adequate, a number of the findings in your report indicate that product liability reform is necessary.

Thank you, Mr. Chairman.

Senator **Bryan**. The Chairman has asked for one more question. We always defer to the Chairman. Mr. Chairman?

The **Chairman**. Mr. Delfico or Dr. Arnold, with respect to the uniformity raised by our distinguished colleague from Wisconsin, did you find why the insurance companies who fostered this whole move are asking for uniformity here at the Federal level in product liability, but do not want uniformity for the filing of their numerous contracts of coverage in the 50 several states? Why don't they want a Federal insurance commission rather than 50 state insurance commissions with the diversity and extreme requirements from one state to the other?

I know in my own state, when I compared it to the State of New York back years ago, we had 36,000 licensed agents, more than the State of New York in the little State of South Carolina. We had to try to clean it up. So, I know about the diversity.

But did you find in your studies why the insurance companies want uniformity with respect to these cases, but not uniformity in the application and licensing and filing and the bureaucracy and the cost and the insurance fees and appearance fees in the 50 states throughout just to get a certain policy granted for admission in that particular state?

Mr. **Delfico**. Mr. Chairman, we did not look at the insurance company aspect of the tort system. So, I cannot respond to you in that respect.

The **Chairman**. Thank you, sir.

Senator **Bryan**. Thank you very much, Mr. Chairman.

Mr. Delfico, Dr. Arnold, we thank you very much for your testimony, and we would ask you to remain available subject to any additional questions that committee members might have of you with respect to your studies. Thank you so much.

Mr. **Delfico**. Thank you, Mr. Chairman.

Senator **Bryan**. Our first panel this morning will consist of the Chief Justice of the Supreme Judicial Court of Maine, the Honorable Vincent L. McKusick; Representative Mike Box of the Alabama House of Representatives, representing the National Conference of State Legislatures; Representative Frank Noye of the Pennsylvania House of Representatives on behalf of the American Legislative Exchange Council; Mr. Robert C. Holland, President of the Committee for Economic Development.

We thank each of you for your patience, but I think the depth of interest in this issue is reflected by the amount of questions and the attentiveness of the subcommittee.

We will first hear from His Honor, Vincent L. McKusick.

I would indicate to our distinguished panelists that your full statements will be made a part of this record. We would ask you to try to keep those statements within five minutes.

And, Your Honor, with respect to your testimony, I know you do comment on S. 640. That is not before us today. So, if we could maybe get your comments focused on, as you do in the great majority of your testimony, S. 1400, and we will now tender the floor to you sir.

STATEMENT OF VINCENT L. McKUSICK, CHIEF JUSTICE, SUPREME JUDICIAL COURT OF MAINE, ON BEHALF OF THE CONFERENCE OF CHIEF JUSTICES, PORTLAND, ME

Mr. **McKusick**. Thank you very much, Mr. Chairman and members of the subcommittee. I will direct my attention entirely to S. 1400, and it is a great pleasure to be before this distinguished body.

I am the President-elect of the Conference of Chief Justices, and I appear today on behalf of the conference at the request of our President, Chief Justice Carrico of Virginia. Chief Justice Carrico has testified before this committee stating the position of the conference on prior occasions.

The Conference of Chief Justices is composed of the highest judicial officers of the 50 states, plus six state-like jurisdictions like the District of Columbia, Puerto Rico, the Virgin Islands.

The Conference of Chief Justices opposes Federal preemption of the product liability law of the states. This opposition is not directed at the merits of the various proposed Federal standards, but is based on concerns for federalism and the orderly development and administration of the law. Thus, the conference does not speak from the perspective of the plaintiff or the defendant, but from that of the state judicial officials who would have primary responsibility for administering the statute.

We are concerned that Federal standards, whatever their intrinsic merit, would complicate rather than simplify the law. This is because these standards would be imposed on the states without creating Federal question jurisdiction. Thus, most product suits would continue to be tried in the state courts with Federal jurisdiction limited to diversity cases.

In addition, the Federal standards would have only limited application to product cases, even those to which S. 1400 applied, leaving the remainder of state tort law in place. They must, therefore, be viewed as a single overlay on the 50 existing state court systems and their systems of tort law. This overlay will fit somewhat differently in each state resulting in a unique, new, combined product liability system, and this system will coexist with an unchanged system for all other claims in tort.

It follows that the Federal standards will be applied in many different contexts and that they will inevitably be construed and applied differently not only by the state supreme courts, but by the 12 Federal circuit courts of appeals under diversity jurisdiction. In this process, state supreme courts will no longer be the final arbiters of the tort law in their states. Federal standards will make the Supreme Court of the United States the court of last resort and the only court of last resort for a new class of cases with a mix state and Federal questions largely outside its current jurisdiction. These cases will come from 50 state supreme courts, as well as 12 Federal circuits, to a Supreme Court that many legal scholars and apparently most of its members, the Justices themselves, believe is already overburdened and incapable of maintaining adequate uniformity in existing Federal law.

The consequences on federalism, as well as uniformity and the future development of the law, are in our opinion incalculable. The Conference of Chief Justices therefore urges the Congress to go slow in tinkering with the tort law of the states.

That completes my statement. I would be very happy to try to respond to questions.

[The statement and questions and answers follow:]

STATEMENT OF THE CONFERENCE OF CHIEF JUSTICES

Mr. Chairman and Members of the Subcommittee. I am Vincent L. McKusick, Chief Justice of the Supreme Judicial Court of Maine and President-Elect of the Conference of Chief Justices. I appear today on behalf of the Conference of Chief Justices at the request of the Conference's President, Chief Justice Harry L. Carrico of the Supreme Court of Virginia. The conference is composed of the highest judicial officers of the 55 states and territories and the District of Columbia.

Our preferred witness would have been Chief Justice Carrico who has testified at earlier hearings on product liability conducted by this committee. However, he is unable to be here today and I am pleased to substitute for him.

My testimony is, of course, directed primarily to S. 1400, the Product Liability Reform Act, and will express the Conference's longstanding position on federal product liability legislation as expressed by Chief Justice Carrico and others before him. But it also will touch on directly related legislation and our growing concerns about the broader impact of federal legislation on the role of state courts in our federal system.

Accordingly, we appreciate the opportunity to express our views on the general subject of product liability as it has been considered by the Congress in recent years. These views are guided by the Conference's general policy position opposing broad federal preemption of the tort law of the states as well as our resolution specifically opposing the General Aviation Standards Act, now designated S. 640.

Under our general policy we have opposed all legislation that would replace state statutory and common law governing the substantive rules of product liability and damages. In doing so we have not spoken from the perspective of the plaintiff or the defendant, but from that of the judicial officials who would have primary responsibility for administering the federal law.

The Conference has never taken a position on the merits of the various federal standards proposed in the general product liability bills and that is true of S. 1400. Rather, we have directed our attention to the fact that the standards, whatever their intrinsic merits, would be imposed without creating federal question jurisdiction or a federal cause of action. This means that despite the federalization of state law the legislation would leave the trial of most product cases in the state courts where they have traditionally been tried, and that access to the federal courts would come only through existing diversity of citizenship jurisdiction.

To come quickly to the point, we do not believe it is possible for Congress to preempt any area of the tort law of the states without creating new complexities for the federal system and unsettling the whole body of state tort law. There is no quick fix for what some perceive as the shortcomings of the present system, particularly if uniformity is a principal goal.

We should not forget that we did not suddenly arrive at the present state of the law, nor did we arrive here by chance. Current doctrines were not devised by law professors on theoretical grounds. They developed over many decades to meet real but changing needs and they reflect an accumulated wisdom based on countless thousands of arguments before the courts and legislatures of the states, institutions with some claim to a role in the great American experiment in self-government.

Nevertheless, some say the law of product liability has gone too far; that the cost of production and the risks of business enterprise have increased inordinately; that liability insurance is either too expensive or unavailable; that industrial and scientific progress is unnecessarily inhibited.

Let us assume for the moment that tort and warranty rules have gone too far, an assumption I am willing to make only for the purposes of discussion, and that a reversal of the trend is needed. Is federal legislation the answer? First of all, if we are looking for uniform, settled law, the answer cannot be found in federal legislation. We already have a high degree of uniformity on major points of tort and warranty law. This has been achieved over many decades through tens of thousands of cross precedents in case law relied on by the states. The rules for product liability developed and recommended by the American Law Institute's Restatement of Torts and the Uniform Commercial Code of the National Conference of Commissioners on Uniform State Laws have been widely accepted.

What will federal legislation such as S. 1400 do to uniformity? All related state law will be preempted and a federal law, with new terms and new concepts, will be substituted. We must view these federal standards as a single overlay on the 55 existing state and territorial court systems as well as the federal system under diversity jurisdiction. The overlay will fit somewhat differently in each instance. It will impact some states more heavily than others. But in each instance we will have, in conjunction with existing state law and practice that remains unchanged, a unique new product liability system. And this new system will coexist with an unchanged system for all other claims in tort.

It follows that the federal standards, however well crafted, will be applied in many different contexts and that they will inevitably be construed and applied differently, not only by state supreme courts but by the 12 federal Circuit Courts of Appeals. With each state starting anew such uniformity as we have achieved to date will be destroyed and the long process of interpretation to unravel new concepts will begin. In this process state supreme courts will not be, as they are today, the final arbiters of the tort law of their states. Federal statutory standards, even without federal question jurisdiction, will make the United States Supreme Court the court of last resort for a new class of cases with mixed state and federal questions largely outside its current jurisdiction. We will not only have state courts interpreting and applying a mix of state and federal law in the same case but we will have the lower federal courts, under diversity jurisdiction, interpreting and applying the same mix. A legal thicket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court many experts feel is already overburdened and incapable of maintaining adequate uniformity in existing federal law as it is variously interpreted by the United States Courts of Appeals.

The consequences for federalism, as well as uniformity, are therefore incalculable. No other federal law has reached so far into the substantive civil law that traditionally has resided in the states and that, under diversity of citizenship jurisdiction, also has been binding on the federal courts. The states will be forced to provide the judicial structure for enforcing the federal law but will not be permitted to decide the social and economic questions in the law their courts administer.

It also is clear that the pending bills, while limited to products in interstate commerce, have the potential for disrupting the common law in the whole range of tort reparations. Certainly each state, in starting over in the product field, must weigh the impact of these standards on other areas of the law.

As former Chief Justice Jack Pope of Texas noted in earlier testimony before the Senate Commerce Committee, "States cannot, consistent with sound administration of justice (and) judicial economy ... , have one set of rules to try product liability cases and a different system to try an ordinary negligence or malpractice case. Even the joinder of a physician in a products liability case concerning his administration of defective drugs, will require two different systems of trial and submission to the jury, or a complete overhaul of our state tort systems."

On the questions of federalism it also is important to note, along with Chief Justice W. Ward Reynoldson of Iowa, another of my predecessors as a Senate witness on this subject, that "it makes no sense to federalize a significant portion of state tort law while denying jurisdiction to the federal courts except under diversity of citizenship when diversity jurisdiction, in the view of most expert opinion, should be eliminated as a first step in reform of our dual system of state and federal courts." Federal intrusion in state tort law, as Chief Justice Reynoldson said, will throw "a great unknown" into what is, after some 200 years of development, "a carefully balanced national system of justice."

Allegations of excessive legal cost, excessive cost of products, and the excessive cost or unavailability of liability insurance are at the root of present federal proposals. If those allegations are true, the remedies lie with the states, where tort and warranty law have always resided. State courts and legislatures are well situated to determine the social and economic impact of present law on their own communities, and many legislatures already are addressing these product liability issues.

Thus far, Mr. Chairman, my remarks have been directed to the general product liability bills such as S. 1400. But it is important to note that the General Aviation Accident Liability Standards Act, S. 640, and certain other bills that have been before the Congress in recent years, also have the potential for profoundly changing, without anyone quite noticing it, the traditional roles of the state and federal courts in our complex federal system.

The jurisdictional situation is made infinitely more puzzling and complex under the General Aviation Accident Liability Standards Act, which would create its own set of standards, including a rule of comparative responsibility, while authorizing concurrent state and federal jurisdiction. The Act would also give defendants an absolute right to remove cases from state to federal court. Surely Congress should not enact both bills and so create differing sets of federal standards to be applied along with residual state law in different classes of product liability cases. Unlike the general product cases governed by S. 1400, we must assume that most, but not all, general aviation cases will be tried in the federal courts, creating a new body of federal case law through direct appeals to the circuit courts and the Supreme Court of the United States. But this body of law will present different questions, and presumably different answers, than questions in cases appealed to state supreme courts and the federal circuits before reaching the Supreme Court under the Product Liability Reform Act.

One need not unravel this tangled web to conclude that even a limited federal product liability statute, leaving residual state law in place, would open the door to fundamental changes -- changes that are impossible to predict but that are certain to follow as the Supreme Court becomes more and more involved in a new body of tort law questions in cases involving an intricate mix of state and federal law.

In addition to moving a small but important body of tort law cases to the federal courts, the General Aviation Accident

Liability Standards Act would authorize federal district courts to try related state law claims if a substantial question of fact is related to the state and federal claims. Such state law claims are certain to arise because S. 640 applies only to occupants of small aircraft. The Act would not apply to occupants of a large commercial aircraft, or ground vehicles or structures that might be involved in the same accident.

The General Aviation Accident Liability Standards Act illustrates another aspect of the jurisdiction problems that demand our attention. Surely Congress cannot be expected to tailor tort standards to the particular needs of every business or industry and expect to have a coherent, not to mention uniform, body of law. Nor should Congress, in our view, create federal causes of action for many other problems that transcend state lines without careful consideration of the impact on the federal courts in the first instance, and a concern for the impact on the state courts as well.

In this regard I will mention only the unexpected expansion of federal jurisdiction under civil RICO and recent anti-drug statutes that have brought many cases normally tried under state law into the federal courts.

I did not bring solutions to these problems, Mr. Chairman. They involve complex factors deeply embedded in our federal system. But these factors require our careful attention if the federal courts are to remain courts of special and limited jurisdiction handling issues that are truly federal, and state courts are to retain their historic role as the basic forums for the administration of both civil and criminal justice.

At this point, however, lest you think we are routinely opposed to all expansion of federal jurisdiction, I should note that the Conference of Chief Justices has not opposed legislation that would create new but limited access to the federal courts for mass tort cases arising from a single catastrophic event. It also is important to note that the pending report of the Federal Courts Study Committee, which will outline a comprehensive and long-range plan for improving operations of the federal judiciary, recommends that diversity jurisdiction apply only to such complex multi-party, multi-forum litigation. The report does not discuss routine product liability litigation but clearly would exclude it from federal jurisdiction on the basis of the general recommendations on diversity.

The Study Committee's report, then, reflects the growing concern over jurisdictional issues shown in recent years by both the Judicial Conference of the United States and the Conference of Chief Justices. The Judicial Conference has reacted by creating a standing committee on Federal-State Jurisdiction with four state judges in its membership. The Conference of Chief Justices for its part has a standing committee on State-Federal Relations that is developing a close working relationship with its federal counterpart.

Thus, there is within both the state and federal judiciaries a growing awareness of the need to address jurisdictional issues that are critical to the proper balance and functioning of our unique system of state and federal courts. We respectfully submit that these also are matters that the Congress should address in a structured way if it is to move toward creation of federal standards to deal with matters that transcend state lines but traditionally have been within the jurisdiction of state judiciaries.

Again, my thanks for this opportunity to express our views. I will be pleased to respond as best I can to any questions you may have.

RESPONSES TO THE MAJORITY OF CHIEF JUSTICE VINCENT L. McKUSICK FOR THE RECORD OF THE CONSUMER SUBCOMMITTEE'S FEBRUARY 22, 1990 HEARING ON S. 1400

1. You stated that federal tort reform would make the United States Supreme Court the court of last resort, and the only court of last resort in product liability cases. Do you perceive any adverse consequences, and particularly any disadvantages to the parties involved in such suits, in having the Supreme Court as the final arbiter in product liability cases?

RESPONSE: To make the United States Supreme Court the court of last resort in product liability cases is in practical operation to have no court of last resort at all. The United States Supreme Court takes for full hearing only about 150 cases a year, and state tort cases would be very low priority among the 5,000 or so petitions for certiorari filed with the Supreme Court annually. Nonetheless, serious adverse consequences would be created for the parties in both expense and delay when unsuccessful parties before the state supreme courts or U.S. courts of appeal (on diversity cases) go through the process of trying to get review by the United States Supreme Court. Since that possibility always exists, it is sure to be resorted to in a larger number of tort cases where a substantial amount of money may be involved.

2. What effect do you believe enactment of federal tort law like S. 1400 will have on the caseload of federal and state judges?

RESPONSE: Of course, the total workload of judges, both federal and state, will increase by the enactment of federal tort law. Particularly during the period of several years when questions of interpretation of the new federal law are being worked out, the litigated cases will be more numerous and take longer to try. In addition, the United States Supreme Court specifically will have added to its group of certiorari petitions the new group of product liability cases combining state and federal law.

3. As you know, it has been suggested that product liability cases are time consuming. In your opinion, what effect would S. 1400 have on the length of time necessary to litigate product liability cases? For example, would federal standards be more likely to increase or to decrease the length of time to complete a case?

> **RESPONSE:** Plainly, the addition of another layer of legal standards to product liability cases will not decrease the length of time to complete product liability cases. Equally plainly, the result of S. 1400 will be to increase the length of time to complete product liability cases, at least for the years (which may be numerous) that it will take for the new federal rules to become established in their proper federal construction and application in conjunction with the state tort rules.

4. In your testimony, you agreed that it is theoretically possible that more uniformity might be developed throughout the states if all fifty states were required to implement one federal standard, rather than each state implementing its own standard. Many believe, however, that a federal standard such as S. 1400, which contains only limited changes to state law, will create more confusion in the tort system, in that state and federal courts will be forced to apply both federal and state standards in a field of law that is already very complex. Do you agree with this argument?

> **RESPONSE:** My agreement that it is theoretically possible that more uniformity may develop if all the state jurisdictions were required to implement one federal standard is even theoretically possible only after an extensive "shake-out" period. In that period, the federal product liability legislation, such as S. 1400, will create more confusion in product liability cases. Also, it must be remembered that product liability cases represent only one part of the total tort law for which each state supreme court is responsible. As I pointed out in my testimony, product liability claims may often be joined in the same action with other tort claims as to which the federal legislation has no application. Additional confusion and difficulties are presented then in the trial of those resultingly more complex cases. In view of these additional complexities produced by the limited modifications made by S. 1400, I suggest that a legitimate question arises whether such changes are "worth the candle."

Senator **BRYAN**. Thank you very much, Justice. I think we are going to take all of the panel, then ask each of you to remain, if you will, please, because I know that there are questions.

We will next hear from Representative Mike Box. Representative, good morning.

STATEMENT OF MIKE BOX, STATE REPRESENTATIVE, ALABAMA HOUSE OF REPRESENTATIVES, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. **BOX**. Good morning. Thank you, Mr. Chairman, members of the subcommittee.

I am Mike Box, and I am a member of the Alabama House of Representatives where I serve as the vice chairman of the House Judiciary Committee. I am also the chair of the National Conference of State Legislatures' Committee on Law and Justice. It is in that capacity that I address the subcommittee today.

Mr. Chairman, I appreciate your prefatory remarks earlier this morning. It reminds me of a saying that we have in Montgomery. If it ain't broke, don't fix it.

S. 1400 is an attempt to eliminate the ability of states to safeguard individuals from defective items in their states. It will accomplish this by preempting state laws in product liabilities. NCSL has a longstanding policy opposing any Federal preemption of state products liability laws.

You have copies of my written statement before you. I would like to highlight briefly four points for the committee's consideration.

First and foremost, because federalism is so important to participatory democracy and self-determination, preemption should only be a last resort. An earlier speaker mentioned the problems between upper state New York and Manhattan in interpreting state law. If they cannot agree on how to interpret the laws of the State of New York, how can we expect the State of Alabama and the State of New York to agree on interpreting a Federal law? And that is what this statute will do. It seeks to impose a national standard, but it is going to be interpreted in state courts in 50 states and the several territories. Other solutions should be pursued leaving preemption as a last resort.

Second of all, the issue of competitiveness really does not apply. All industry, all manufacturers, whether domestic or foreign, compete on a level playing field in each individual state. I honestly do not believe that Japanese industry is any better able to understand the laws in Alabama, New York, California than our own United States companies.

Additionally, on the issue of innovation, I submit to the committee that this is probably furthered by the diverse nature of our product liability law. An American company has got to test their product before they market it. By allowing diverse laws and allowing each state to develop as they see fit within their own state boundaries, it gives in essence a forum for a manufacturer to shop in deciding where they want to test something first. It gives them a test market before going nationally.

Third, I must emphasize that we not rush into any admiration for the economic integration of Europe. I point out that our Constitution written 200 years ago established a system of federalism that is the model for the rest of the world. In other words, let them look to us, not vice versa.

If uniformity is so important, what will we do if we base our laws on what is going on in Europe should they decide to be more pro-consumer? Will Congress then change its approach?

Finally, I have to point out as a state legislator that national laws have a very broad impact on all aspects of state laws. Products liability, although limited in nature, is going to have ramifications throughout the state tort system. For example, in Alabama, we are a contributory negligence state. There are certain provisions of S. 1400 that lend themselves to a comparative negligence standard.

For the benefit of those who are not familiar with the difference in the standards, contributory negligence is much more favorable to the defendant. In Alabama we have a law applied to products liability that is favorable to the manufacturer, and that law will be weakened if you pass S. 1400.

State legislatures are simply better able to respond to the needed changes. We cannot assume that future Congresses will be as sympathetic to the goals of tort reform. I urge the subcommittee to allow the states to continue their thoughtful and innovative ideas in this area and that you reject S. 1400.

I will be more than happy to respond to questions.

[The statement follows:]

STATEMENT OF MICHAEL BOX, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. Chairman and distinguished members of the Subcommittee:

Good morning, my name is Mike Box. I am a state representative from Satsuma, near Mobile, Alabama. I serve as Vice Chair of the Alabama House Judiciary Committee, and as Chair of the National Conference of State Legislatures Committee on Law and Justice. I am here on behalf of the National Conference of State Legislatures, which serves all of the nation's legislatures and represents their interests in state-federal policy matters, such as preemption of state product liability laws. The National Conference of State Legislatures does not take policy positions on state legislation, but has been an active clearinghouse for tort reform information. Since 1983, NCSL has consistently testified against efforts to impose uniform national standards for product liability. We have revisited our policy several times and have yet to uncover a compelling reason to modify our position. With the introduction of S.1400, we must once again object; the need for such legislation has not been shown, and yet its implications for our federal system are enormous.

Let me say, by way of introduction, that I am a practicing lawyer, and I am supporting efforts to reform our own civil justice system in Alabama. Speaking for myself, I am sympathetic with the intent of the sponsors of S.1400. Nevertheless, I come to you with a strongly-held personal view against preemption that leaves me quite comfortable representing the views of the state legislatures in opposing S.1400. This is a matter that should and will be resolved in the state legislatures.

It is important for clarity on this issue to separate arguments for or against certain provisions of S.1400, with arguments for or against nationalizing the tort system. Product liability is only a small part of the tort system, but forced changes in this narrow area of the law at the national level would reverberate throughout state civil justice systems. My convictions on the need for tort reform are checked only by my great concern for protecting the principles of constitutional federalism.

The issues of proper compensation for injured persons and suitable protections for businesses are matters of social values and public policy that should be addressed at the state level, in the absence of a national economic crisis. Only with clear proof of the need and of the effectiveness of national rather than state solutions should we consider the sweeping preemption of state laws and constitutions contemplated by S.1400 Such proof has not been shown.

I have faith in the American system of federalism and prefer it to foreign models. Much has been made by proponents of national product liability law of Japan's uniform system of tort laws, especially those features that limit discovery and punitive damages. Seeking a solution by emulating one aspect of Japanese society overlooks the tremendous costs imposed upon the Japanese in order for the country to remain competitive. For example, the astronomically inflated costs of food and housing far exceed the costs that diverse state laws might impose on our consumers.

Japan, you must remember, is a unitary state and not a federal union. Its people are homogeneous and it is geographically compact. The beauty of America is its diversity and its geographical, cultural and economic expansiveness. Only a federal system that is carefully preserved can accomodate such diversity.

Arguments for uniform laws as a means of promoting competitiveness ignore the advantages of a decentralized and federal system of civil justice. The recent announcement by the White House Council on Competitiveness endorsing S.1400 cites the advantages of uniform national rules in Japan. Likewise, some co-sponsors of the bill say that: "While U.S. manufacturers are trying to make sense out of 50 different state product liability laws, foreign competitors quickly move in." This argument is specious. It cannot be seriously suggested that foreign competitors can figure out our 50 state laws better than our own domestic manufacturers. Japanese and other foreign manufacturers are subject to suit for product defects in state courts just as surely as American manufacturers are. On the other hand, the existence of a national uniform standard in Japan has done little to insure that our manufacturers take advantage of their market.

If we are concerned about international competitiveness, I would suggest that Congress pay more attention to the Federal deficit problem than to state civil justice systems. Even though most economists would point to our national debt as being the major burden on our competitive posture, many in Washington have avoided addressing it directly. I know it's not easy for a legislative body to balance a budget. In Alabama, we recently had to raise $55 million in revenue to meet unanticipated needs. In spite of the intractability of the national deficit, it is fair to expect the national government to correct what it already has authority to do rather than unnecessarily expanding its authority at the expense of the states. Taking steps that would invalidate state constitutions should be done only as a last resort.

The Product Liability Reform Act, S.1400, is radical because it opens the door to substantially greater federal intrusions. It may appear modest to some, but that is only because its backers have adopted an attitude of incremental expansion into the realm of state authority. Already interested persons are readying to make more significant changes to state tort law. For example, the Administration would include a "state of the art" defense, provide additional limits to punitive damages, extend the limit on joint and several liability, and broaden the protection under the statute of repose. Indeed, one problem with addressing federal product liability legislation separately from other aspects of tort reform is that the civil justice system is an organic whole, where changes in one area will have destabilizing effects on the whole system.

As Europe moves toward economic integration in 1992, Congress will undoubtedly hear renewed clamor to preempt state legislation from those who assume too hastily that integration demands greater centralization here. Remember why we developed as a federal nation. Abandoning fundamental principles of our system resonates with "blame America first" overtones. Our founding fathers recognized the importance of having governments responsive to the electorate. Broad powers were reserved to the states so they would serve as bulwarks of freedom, an antidote to an overpowerful national government. In case you think that such talk is mere sentimentality, recall your reactions to new freedoms for nations in eastern Europe. We celebrate the escape from central planning and central domination of Moscow. We should not become an armchair democracy forsaking the exercise of fundamental principles of self determination, as we cheer on those who play out liberty on our television sets.

The temptation to look to EC '92 as a rationale for greater centralization should be carefully scrutinized. A "Dear Colleague" letter written by the same co-sponsors of this legislation cites as "frustrating" a directive "implementing uniform product liability laws among its member countries before we have established uniformity and predictability within the United States." First, the directive did not implement any law, but merely set a timetable for action by member nations. Second, the supposedly "uniform" law allows nations to adopt non-uniform provisions with respect to non-economic damages, such as pain and suffering. Finally, Europe has more to learn from us about federalism than we have to learn from it. The European model of a bureaucratic state is not something to imitate, even as it becomes magnified through EC '92.

Proponents of a uniform national law should be warned that predictability in any legislative body, state or federal, is impossible. Nothing guarantees our seats; nothing guarantees unchanging demands from our constituents. A national law might not always be more favorable to the producer than to the consumer. Nothing would prevent a future Congress from looking to the EC '92 directive, for instance, and borrowing the provision that members shall have uniform provisions establishing joint and several liability, or extending the statute of limitations to three years.

Just as new theories of strict liability were introduced to respond to new uncertainties in the marketplace, so now adaptations to market changes are most appropriately developed at the state level. For instance, if there is an appropriate remedy for a person harmed by a drug of uncertain origin, state laws should be allowed to evolve to determine appropriate remedies. Theories of market share, enterprise or alternative liability are more appropriately addressed at the state level. National legislation would freeze the fluid development of the law, and depending upon the make-up of Congress, experiments with new theories of liability could have sweeping detrimental effects upon consumers or producers. Congress is simply less prepared institutionally than state legislatures to deal with periodic adjustments to tort law.

Professor William Van Alstyne of Duke University Law School reminds us that it is "the likelihood of continuing differences . . . that is expected to characterize custom, actual practice and substantive law from state to state, all without recourse to Congress on most matters. Diversity and pluralism are, in short, the suppositions (one may say "the very essence") of federalism. They are its nature, not its aberration, i.e., not a condition which, when it appears, enables Congress to take over the field." Van Alstyne, "Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea," 1987 Duke Law Journal, 769, 775 (November 1987). The differences that exist among states, combined with the free mobility of our citizens, serve to make federalism work. As we legislate in the states, we must be responsive to the presence of neighboring states that may have more attractive policies. Thus federalism acts as a check upon itself. We should not casually abandon through unnecessary preemption what is deeply ingrained in our Constitution and our culture.

It is important to recognize how the national law might affect state laws. The recent report of the General Accounting Office to the House Energy and Commerce Committee, Subcommittee on Commerce, Consumer Protection and Competitiveness concludes that after the adoption of a national product liability law, variations would be reduced, but "differences would most likely remain." p. 56. The Report calls into question the need for certain tort reforms. Perhaps more importantly, its failure to make any recommendations and its measured tone makes the case that a crisis of national proportions requiring broad preemption, such as envisioned by S.1400, does not exist.

In order to show that uniformity would not likely be achieved under S.1400, one can look at what would happen with the concept of punitive damages. The bill would raise the standard of proof for recovery of punitive damages to "clear and convincing evidence". The conduct would have to be "conscious, flagrant indifference." The law of punitive damages has developed by statute or common law in each of the states. A number of terms are used by the courts of the states to encompass such conduct: malicious, wanton, willful, reckless, grossly negligent, extreme or exceptional, fraudulent or oppressive. Injecting new terms to define conduct subject to punitive damages will increase the uncertainty of the law as those terms find meaning within the laws of each of the states. Confusion will be caused if a part of the complaint, which is not a product claim, seeks punitive damages; the trier of fact then must assess damages based upon two standards. Further confusion might result under those circumstances in the event of a bifurcated trial. State courts having been accused of allowing excessive damages, will still be responsible for interpreting the new federal law. Whether greater certainty will result is doubtful.

With respect to modifications in joint and several liability for non-economic damages, the language states that all defendants in product liability actions would be severally liable, and not jointly. One consequence of this might be that a plaintiff would be compelled to omit the producer as a party in order to obtain joint liability against two other principle defendants on theories not related to product liability. If those defendants were of unequal culpability, one of them would have the incentive to join the manufacturer under a product liability cause of action in order to destroy the joint liability. Because of the complexities and possible permutations from state to state, questions such as joint and several liability should be left within the judgment of the states and not the federal government. At the state level, policy is evolving on the whole in a satisfactory manner.

Whether practices such as expedited settlements fit appropriately within the systems of states is not easily determined. At first glance, it appears to me as a lawyer that offering the incentive of putting a settlement in a complaint or response encourages irresponsibility by lawyers not fully aware of the harm or liability to their client. Suppose a plaintiff offers to settle for $50,000 and the defendant refuses. In the course of subsequent discovery the plaintiff realizes that the claim is worth more than $200,000. The lawyer should be allowed to raise the demand for settlement, but under those conditions, it is possible that the claimant's lawyer would have a conflict between the interest in settling for a definite $50,000 in order to retain the fee, or taking the chance that a nearly definite claim of $200,000 might bring a verdict of $199,999, thus eliminating the fee.

Under S.1400 states with alternative dispute resolution mechanisms would be affected by Section 202 of the bill, but other states would not be affected. Again, personally, I believe that alternative dispute resolution is an admirable objective, but each state should determine how such procedures fit into its civil justice system. In this section at least, the bill acknowledges that states have different systems. Knowing that only two years ago, H.R. 1115 proposed a mandated national alternative dispute resolution mechanism, I suspect that this proposal is considered to be only the first step in the direction of further national mandates.

NCSL therefore asks this Committee to reject S.1400 because it addresses a matter than can and should be solved at the state level. The bill would cause confusion and uncertainty in the application of state law and would offer no effective solution to concerns about competitiveness.

Perhaps in the past decade we have all become too willing to accept rhetorical flourishes for federalism as a substitute for actual empowerment. However, given the choice between the wet blanket of federal legislation and the crazyquilt of state legislation, I would choose the vitality that comes through diversity. I invite each of you to visit your state legislatures to see how active they have been in this area. Although you might find us occasionally wishing this dilemma upon Washington when we find it frustrating to balance the interests of the all interested parties, you will not find us walking away from what is our responsibility to our citizens and to our country.

Thank you very much.

Senator BRYAN. Mr. Box, we thank you.

Mr. Noye, do I pronounce that name correctly, sir?

Mr. NOYE. Yes, sir.

Senator BRYAN. Mr. Noye, we would be delighted to hear from you next.

STATEMENT OF FRED NOYE, STATE REPRESENTATIVE, PENNSYLVANIA HOUSE OF REPRESENTATIVES, ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Mr. NOYE. Thank you, Mr. Chairman and members of the subcommittee.

Senators, I am pleased to respond to your request for testimony about the position of the American Legislative Exchange Council on S. 1400, the Product Liability Reform Act.

The American Legislative Exchange Council, "ALEC," is the Nation's largest individual membership organization of state legislators. Approximately 2,300 state legislators from all 50 states and Puerto Rico and both political parties, including more than 500 legislative leaders, have joined together to help advance the conservative, free enterprise agenda in civil and criminal justice, regulation, tax and fiscal policy, privatization, education, health care, the environment and the entire spectrum of issues facing America's legislators today.

I serve as second vice chair of ALEC and have been a member of ALEC for eight years. I am in my ninth term as a member of the Pennsylvania House of Representatives and chairman of the Republican Caucus.

ALEC has always been a strong defender of states' rights within a Federal system, and it considers product liability law like the rest of tort law, to be within the traditional province of the states. ALEC continues to hold the conservative view of the relationship between the state and the Federal governments. Nevertheless, ALEC has supported uniform Federal product liability legislation since 1982.

Why? Because ALEC recognizes the need for some consistency in our Nation's product liability law. If the common law applicable to product liability had developed in more or less the same way in all of the states, we would have reasonable uniformity and predictability. Unfortunately, that is not the way it has happened.

In my own State of Pennsylvania, for example, the courts have taken a rigid and an unrealistic approach to strict product liability and pushed our law out of the mainstream. Legal commentators have repeatedly criticized Pennsylvania's product liability law as confusing, extreme and unworkable. The situation cries out for a legislative solution, and we are working toward that in Pennsylvania. Unfortunately, the history of the past several years shows that remedying this situation will occur slowly, if at all. It is for this reason that ALEC continues to support uniform Federal product liability legislation as well as individual state efforts.

Let me provide you with some background information to indicate the depth and breadth of the concern for product liability issues among legislators who belong to ALEC.

In the past two decades, the majority of state legislatures have enacted one or more rules governing product liability. These state laws are intended to be fair to everyone in the chain of sale, from manufacturer to retailer to consumer. The purpose of the legislation has been to provide predictability about product liability rules for product sellers, manufacturers and insurers and to inform injured parties about their respective rights. A few states, such as Ohio, have enacted broad product liability statutes providing generally-applicable standards of liability.

Legislation enacted in some states has been designed to resolve problems unique to that state such as aberrant court decisions. The Louisiana Legislature, for example, enacted a bill that establishes four theories of product liability. The legislature wanted to eliminate one theory of product liability created by the courts of Louisiana and to prevent the courts from creating new theories of liability. Statutory enactment of reasonable rules of liability in some states, then, provides only limited predictability.

Unfortunately, individual state legislation has not completely accomplished the twin goals of fairness and predictability because state laws still vary and because product liability has become a matter of interstate commerce. Some portion of the products made in an individual state are shipped out of that state; the amount varies among the states.

Manufacturers and sellers still face variations from state to state in the rules governing product liability. At the same time, people injured by products may find their claim barred by the rules of one state, while they can proceed with their claim, or even seek punitive damages, in another state.

Some state legislatures have been unable to enact product liability legislation. For example, the Pennsylvania legislature has struggled for over 10 years to enact a reasonable product liability statute, but to date it has been unable to do so. Product liability bills are currently pending in both houses of the Pennsylvania General Assembly. I am pleased to say that I am a cosponsor of House Bill 916 which would go a long way towards the clarification and reform of Pennsylvania's product liability law by providing realistic standards of liability. These include:

The adequacy of warnings or instructions about products will be measured by a common-sense standard: What information would a reasonable person have provided?

A non-manufacturing supplier of a product will not be held liable for an injury unless he was actually responsible for the product's defective condition, or unless he is the only supplier of the products who can be sued in Pennsylvania.

The design of a product is not defective if there was no safer design available, (that is if the design was "state of the art,") when the product was manufactured.

In cases involving products like prescription drugs, which go through the strict and exhaustive approval process of the Federal Food and Drug Administration, punitive damages may be awarded only in those rare instances when the manufacturer cheated on the approval process itself.

ALEC believes that a Federal product liability bill should embody some general principles that have been incorporated in past Federal product liability bills and in the statutes of several states. Some of these principles include: reasonable standards for manufacturer liability, limits on the liability of product sellers when the injury was not caused by the seller's negligence, limits on the application of paint and several liability for punitive damages, reasonable standards for liability and a clear and convincing evidence, burden of proof encouragement of alternative dispute resolution procedures, and procedures for offsetting workers' compensation payments for damage awards.

These principles are embodied in the laws of individual states. For example, the rule that a product seller is not liable unless his negligence caused the injury, or the manufacturer cannot be sued in the state or is judgment of proof, has been exacted by 21 states, including Arizona, Kentucky, Louisiana, Missouri, Nebraska, Tennessee and Washington. Product seller provisions are included in bills introduced in several states during this legislative session, including Mississippi, New York, and Pennsylvania. We believe that these principles are fair to claimants and defendants in product liability cases. Their enactment would provide uniform rules applicable in all courts, state and Federal, in cases involving product liability. They would allow manufacturers to reasonably assess the likelihood that they would be held liable for injuries caused by new and innovative products or by improvements to old products.

The 2,300 legislators who belong to the American Legislative Exchange Council urge you to support Senate Bill 1400 by moving it forward quickly.

Senator **Bryan**. Thank you very much, Mr. Noye.

Mr. Holland, you are batting clean-up on this panel, sir.

STATEMENT OF ROBERT C. HOLLAND, PRESIDENT, COMMITTEE FOR ECONOMIC DEVELOPMENT

Mr. **Holland**. Thank you, Mr. Chairman. I am pleased to be here and to speak on behalf of my organization, the Committee for Economic Development. CED, as I think you know, is a nonprofit, nonpartisan, nonpolitical research and education organization composed of more than 200 business leaders and college presidents around the country.

We took a look at the whole issue of tort reform in a lengthy study that we published in 1988 called "Who Should be Liable? A Guide to Policy for Dealing with Risk," a copy of which has been filed for the record by reference.

The purpose by which we undertook that study was to evaluate in broad context how tort liability is working in this country, and we found the best way to judge that performance was to evaluate how well it was accomplishing the two main functions for which it was designed: compensating persons injured by the acts of another, and deterring the conduct that causes such injuries.

That question, of course, cannot be answered by looking at tort liability in a vacuum. We also had to consider how tort liability relates to the rest of the economy and also to other forces operating in our economy that deter risk and compensate victims. By other forces, I mean two in particular which work to deter risk, namely, government regulations and market forces; and on the injury compensation side, various social and private insurance mechanisms.

Our study made it clear that each of these components of the liability system has its own strengths and weaknesses, costs and benefits. Each has a useful role to play.

To summarize briefly, our fundamental conclusion is that the new demands on the tort liability system over the last couple of decades have strained it to the point that it now neither effectively deters nor efficiently compensates in a great many cases.

Consider first the goal of deterring injury by making responsible parties pay the costs of those injuries. Liability standards have escalated. They have moved increasingly beyond negligence to strict liability and in some cases to absolute liability. As a result, great uncertainty and great risks have evolved for the producer or anybody else undertaking an activity that is subject to possible suit.

Imposing liability where a defendant has taken all reasonable precautions serves no positive deterrent function. Consequently, it does not serve one of the two basic purposes for which the tort system was designed. On the contrary, if taking good care does not protect you from suit, it undermines the incentive for other parties to take appropriate care and so may actually increase the number of future injuries. That is why you hear so much from manufacturers who now feel they face great uncertainties about their exposure to potential liability claims. These uncertainties sometimes impel them not to introduce a promising new product, or to drop an existing useful product line, or to curtail research in areas where liability risks are threatening.

Now, let me turn to the second goal, injury compensation. Expanding liability in order to compensate for injury is often grounded in the mistaken belief that defendants can spread this risk without much cost, smoothly passing it on through only fractionally higher prices for goods and services. In fact, such a transfer is not automatic. Moreover, it is far from smooth and often is not small. The costs to be passed through are unnecessarily high, because tort liability is an extremely inefficient form of social insurance.

Let me try to make the RAND numbers referred to by some prior witnesses have more meaning. Overall, the RAND study said plaintiffs receive only 40 cents out of each dollar spent on product liability or malpractice insurance, 62 cents out of each dollar of workers' comp, and 80 cents out of each dollar of private first-party health insurance. But I believe the right economic way to look at these numbers is to say that if you want to deliver a dollar to an injured person through the tort liability system, you incur a dollar and a half of overhead costs, or what has been called here transaction costs. If you want to deliver that dollar through workmen's comp, you only incur about 65 cents' worth of transaction costs. If you want to confer that dollar through social or health insurance, you only have to spend about 25 cents in transaction costs. That means that the comparative burden of transaction costs in the liability system is six times as high as it is through insurance.

Moreover, that sum total of transaction costs misses another very important category of costs. In our study, we call it indirect costs. Those indirect costs include consumer services foregone because of the threat of liability, innovation deterred, extra money spent that did not need to be spent to keep the doctor from getting sued, and even the extra heavy layer of counsels in the business firms. We tried very hard to measure the total of these indirect costs and we could not bring you a responsible number. But if the right adjective for the transaction costs of tort liability is large, I believe large is also the right adjective for these indirect costs.

Think of what that implies as a burden on society. If injury compensation were the only objective of tort liability, this could clearly be accomplished at a lower cost to our society through alternative private and social insurance mechanisms. That is the key issue as we see it, economically speaking.

We believe the expansion of tort liability with its relatively high costs and its relatively great unpredictability compared to what prevails in other countries detracts from our economic wellbeing by raising prices, creating counterproductive uncertainties, deterring the provision of certain vital goods and services, discouraging product and service innovation and damaging U.S. international competitiveness. This last issue, our international competitiveness, is more important to us than before.

We believe we can reform the tort system. We think reform along the lines of S. 1400 accords well with the theme of our study. We also believe we can tighten up our alternative mechanisms—workers' compensation, social and private insurance, and our regulatory processes—to protect consumers and compensate injured parties much more efficiently in the future than we have in the past.

The rest of my statement is there for you to see. Thank you.

Senator BRYAN. Mr. Holland, that will be made a part of the record.

[The statement and questions and answers follow:]

STATEMENT OF ROBERT C. HOLLAND
PRESIDENT, COMMITTEE FOR ECONOMIC DEVELOPMENT

Before the Consumer Subcommittee
Committee on Commerce, Science and Transportation
United States Senate
February 22, 1990

Mr. Chairman and members of the Subcommittee, I am pleased to appear today to testify on behalf of the Committee for Economic Development. The Committee for Economic Development is a nonprofit, nonpartisan, and nonpolitical research and education organization, composed of over two hundred business executives and educators. Our goal as an organization is to develop, through objective research and informed discussion, findings and recommendations for private and public policy that will contribute to strengthening our free society, increasing productivity and living standards, providing greater and more equal opportunity for every citizen, and improving the quality of life for all. CED develops and issues policy statements and other materials in hopes of bringing about increased understanding by concerned citizens and by leaders in business, government, and education.

I am here today to discuss one such policy statement. In May of last year CED published a policy statement by our Research and Policy Committee entitled Who Should Be Liable?: A Guide To Policy For Dealing With Risk. This statement was based on detailed research and analysis by CED staff and outside experts, led by Professor Patricia M. Danzon of the Wharton School, University of Pennsylvania. The statement was unanimously endorsed by the CED Trustees on the Research and Policy Committee and on the Subcommittee on Risk Management, Dispute Resolution and Injury Compensation, but does not necessarily represent the views of other Trustees or of any other person associated with CED. I appear today as President of CED and as a member of the Research and Policy Committee who personally participated in the development of the policy statement and endorses its contents.

The purpose of the policy statement was to evaluate in broad context the tort liability system that has evolved in the United States. In simplest terms, our task was to evaluate how well the tort liability system was accomplishing its two main functions: compensating persons injured by the acts of another and deterring the conduct that causes such injuries. That question, of course, cannot be answered by looking at tort liability in a vacuum, so we necessarily considered how tort liability relates to other forces operating in the economy to deter harm and compensate victims, i.e. market forces and government regulations for deterring risk and social and private insurance mechanisms for injury compensation. Each of these components of the system has its own strengths and weaknesses, costs and benefits, and each has a useful role to play. Our concern was to identify: (1) those ways in which tort liability plays a useful role in the system; (2) the ways in which tort liability fails to provide socially efficient deterrence and compensation; and

(3) instances where these other mechanisms provide a more efficient resolution. We attempted to identify suitable reforms in tort liability and in the relevant alternative deterrence and compensation mechanisms in order to achieve more efficient and equitable deterrence and compensation while fostering a growing and productive economy that is competitive in world markets.

Because of the breadth of our study, many of its findings are not directly relevant to the issues before this Subcommittee today. Thus, rather than attempt to review our policy statement as a whole, I would like to instead summarize the findings and recommendations most relevant to the work of this Subcommittee. For full documentation of the points presented here, I refer you to the report itself, which I am submitting for the record along with this statement.

* * * *

Baldly put, our fundamental conclusion is that new demands on the tort liability system have strained it to the point that it now neither effectively deters nor efficiently compensates in a great many cases. Chiefly through a succession of court cases, liability for personal injury has been expanded from a fault-based standard to strict liability and, in some cases, to absolute liability. Increasingly, a manufacturer is liable even if all reasonable precautions were taken given the state of knowledge at the time. Manufacturers have been found liable even if the plaintiff wantonly misused the product, if other parties contributed to the injury (e.g., by removing safety devices), and even if no connection has been established between a defendant's actions and a plaintiff's injuries.

The intent of the courts in expanding liability has often been to create incentives for risk reduction by internalizing the cost of injuries to contributing parties and to provide compensation. Although the value of proper deterrence and compensation is beyond question, we believe that the scope of the liability system has been expanded beyond what the system can cost-effectively accomplish.

Consider first the goal of deterring injury by making responsible parties pay the costs of those injuries. Imposing liability where a defendant has taken all reasonable precautions serves no positive deterrent function; on the contrary, it undermines the incentive for other parties to take appropriate care and so may actually increase the number of future injuries. In addition, it encourages inefficient defensive strategies and leads to the withdrawal of products and services as the only sure way to avoid such liability. Manufacturers, facing enormous uncertainty about their potential exposure to product liability claims, understandably often respond by deciding not to introduce a new product, or to drop a promising product line, or to curtail research in areas where product liability risks are unclear. As a result, American manufacturers' ability to compete with foreign manufacturers declines, American jobs are lost, and American consumers are denied the benefits of socially desirable products.

It is impossible to put an exact numerical value on the cost of these indirect effects of expanded tort liability, but one recent survey at least suggests the magnitude of the problem. In that study, nearly one-third of the firms surveyed reported that they had discontinued product lines because of liability concerns, nearly one-third reported that they had decided against introducing a new product because of liability concerns, and nearly one-quarter reported that they had discontinued product research because of liability concerns. In that same study, over half of the CEOs surveyed reported that the U.S. product liability system had a major impact on our international competitiveness, and 75 percent of the respondents expected that impact to grow in significance in the future. Some of these responses may be cost-justified reductions in risk. But in our judgment, after reviewing the cases and empirical evidence, we believe that in attempting to deter socially undesirable conduct, we are also deterring the sort of innovative business strategy essential to a healthy national economy.

Consider next the goal of compensation. Expanding liability in order to compensate is often grounded in the mistaken belief that defendants can spread this risk without cost, smoothly passing it on through only fractionally higher prices for goods and services. In fact, such a transfer is not automatic, is far from smooth, and often is not small. The costs to be passed through are unnecessarily high, because tort liability is an extremely inefficient form of social insurance. In fact, compensation through tort liability is less efficient than virtually any other form of private first-party or social insurance. Overall, plaintiffs receive only 40 cents for each dollar spent on product liability or malpractice insurance, whereas workers' compensation pays the plaintiff roughly 62 cents per insurance dollar, and private first-party health insurance pays over 80 cents per dollar. Over half the money expended in litigating product liability claims goes to cover lawyers' fees and other expenses of litigation rather than to compensate deserving claimants. These costs, of course, are eventually passed on to and paid by consumers in the form of higher prices on products made and sold in the United States. Reducing these costs would benefit consumers and business alike. Thus if compensation is the only effect of tort liability, this could clearly be done at lower social cost through alternative private and social insurance mechanisms.

Furthermore, other factors compound the inefficiency of tort liability as a system of compensation. Awards in the tort system vary widely in amount and are often received only after years of litigation. Other forms of private and social insurance come much closer to the ideal of providing a steady, dependable flow of income promptly following a loss. By attempting to "make the plaintiff whole," the tort system attempts to provide compensation of losses that cannot be compensated by money. On the other hand, tort compensation for wage loss and medical expenses often duplicates other private and social insurance payments, because coordination of benefits is costly and imperfect.

Again, it is not possible to put an exact dollar figure on the magnitude of these costs, but all of the evidence suggests that they are substantial. In 1985, America spent nearly 20 billion dollars on non-automobile tort liability suits, only 9 billion dollars of which went to compensate plaintiffs -- the rest was wasted on litigation costs. As a result of costs like this, American manufacturers have to build into the price of their goods a much higher amount for liability costs than do foreign producers. It has been estimated, for example, that United States businesses spend on the average four times as much of our gross domestic product on liability insurance as do our competitors in Japan, West Germany, France, Great Britain, Canada, Italy, and Australia. Liability insurance expenditures in the United States exceed Japan's insurance expenditures by a factor of fifteen.

Thus, at the same time that the new tort liability system many times fails to carry out its two basic purposes, it also imposes heavy costs, as business firms, service organizations, and individuals must absorb growing legal fees, court awards, and insurance costs. Moreover, the expansion of tort liability with its great unpredictability threatens to detract from our national economic well-being by raising prices, creating counterproductive uncertainties, deterring the provision of certain vital goods and services, discouraging product and service innovation, and damaging U.S. international competitiveness.

* * * *

For these reasons, we have concluded that the United States needs to develop a more balanced approach to risk management. Such an approach would utilize the tort system, updated to meet the new demands placed upon it, where it is most effective, but would also place increased reliance on more effective methods of controlling risk and providing compensation where the tort system is not effective. In some areas more reliance on market forces and government regulation would provide better deterrence than the tort liability system. Moreover, private insurance, social insurance, and workers' compensation are often more efficient methods of compensation than tort liability and should play a greater role. The basic challenge, as we see it, is two-fold: (1) to achieve the best and most cost-effective balance between risk reduction and other social goals, such as more vigorous economic growth, higher standards of living, and greater job creation; and (2) to achieve that risk reduction through the most cost-effective mixture of mechanisms.

I will not burden the Subcommittee with a recitation of all of our recommendations in this regard, but I would like to review the recommendations most relevant to the issues before the Subcommittee today.

First, we believe there is a need for a uniform federal product liability statute. Although many of the states have enacted tort reform legislation in recent years, most of the reforms do not address the fundamental issues. State legislatures have little incentive to adopt fundamental tort reform because they know that changing the law of one state will have little impact on the overall functioning of the tort liability system. Diversity of state standards encourages forum shopping by plaintiffs and creates costly uncertainty for corporations that market goods and services nationwide. Moreover, even if a large number of states were to significantly reform their tort liability system, multistate producers cannot practically develop multiple product lines tailored to the standards of each state, and so tend to view the most demanding state standards as applicable. Thus, states that set unreasonable standards for producers indirectly impose costs on consumers in states with more reasonable standards. For these reasons, we believe that certain basic standards for product liability should be set at the federal level. We recognize, of course, that there will always remain a role for state legislation to address other issues.

Second, we believe that liability should be based on some notion of fault or responsibility for harm. The fundamental standards of tort liability should be designed to encourage all relevant parties to take appropriate care. This means placing liability on only those parties who fail to take cost-justified care and placing some degree of liability on all parties who fail to take cost-justified care. This means, among other things, that joint and several liability should be eliminated. Joint and several liability assigns costs without regard to the extend of fault, systematically imposing excessive penalties on parties with assets and inadequately penalizing others. It encourages frivolous suits against parties who have only a remote chance of being held liable, adding to litigation costs and distorting settlements.

Consistent with this principle of recognizing fault, courts should recognize a defense if a product causes injury when it is unreasonably misused, altered, or used in a way against which the manufacturer had explicitly warned. In such cases, the damages payable by the manufacturer should be reduced in proportion to the degree of the other party's fault.

Third, we believe that steps need to be taken to subject the award of punitive damages to reasonable controls. Punitive awards are a significant component in the unpredictability of damages in tort liability cases. Moreover, the potential for huge punitive awards encourages suits and distorts the settlement process. The lack of coordination of awards in different cases related to the same product or incident can make the total assessment excessive, arbitrary, and highly inequitable between one injured party and another. Huge punitive awards can exhaust a defendant's assets, resulting in gross overcompensation to early plaintiffs and leaving later plaintiffs undercompensated. In order to minimize these problems, it is necessary that some means be found to ensure that punitive damages be awarded only when the defendant's conduct truly warrants them, and only in an amount sufficient to deter such conduct in the future. We have recommended that punitive damages be awarded only in cases of willful and wanton misconduct and be limited to a modest multiple of the compensatory award.

Fourth, we believe that a reasonable statute of repose is necessary to prevent retroactive application of new standards of liability and compensation to products produced many years previously. A reasonable statute of repose, running from the date of the creation of the allegedly defective product, provides a compromise between the conflicting goals of efficient deterrence, fair compensation, and preventing inefficient retroactive liability.

Fifth, we believe that explicit regulatory approval of a particular aspect of product design or labeling by a responsible government authority should bar tort liability on that aspect. The bar would not apply in cases involving fraud or suppression of evidence in obtaining regulatory approval. As matters stand today, there is a substantial overlap between regulation and tort liability for product design and warnings. For these disputes, regulation appears to be the more efficient alternative. Courts have greater difficulty in resolving design and warning cases than manufacturing defect cases because the definition of a design or warning defect raises more complex issues and requires greater expertise to resolve correctly. Furthermore, the courts have a built-in bias toward placing absolute liability on the producer because liability is usually determined with the wisdom of hindsight and in the presence of an injured victim. In view of the extensive effort and expertise that properly goes into regulatory standard setting, allowing the courts to second-guess regulatory standards may thus result in unjustified imposition of liability and the unwarranted withdrawal of products that, although not risk-free, nevertheless are thought to be low enough in risks relative to their benefits to be the products of choice for some purposes.

Sixth, we believe that the proper remedy for workplace injuries is the workers' compensation system, and that tort suits against the manufacturers of supplies or machinery used in the workplace should be disallowed. Placing sole liability on employers through the workers' compensation system has advantages in prevention, compensation, and overhead costs. Employers are uniquely placed to make efficient choices for injury prevention and risk management. They have direct control over many aspects of workplace safety and indirect influence over other potential contributors (i.e., product suppliers and employees) through the terms and conditions of supply and employment contracts. Tort liability suits against the manufacturers of products used in the workplace are unnecessary for deterrence, because employers who are strictly liable through workers' compensation have strong incentives to monitor the safety of the products they purchase for use in the workplace. Regulation and market forces also provide additional risk control. Indeed, the employer's incentives for safety are undermined to the extent he or she can recoup the workers' compensation benefits payable from the tort defendant by placing a lien against the workers' tort recovery. The best solution, therefore, is to set and keep the benefits of the workers' compensation system at an adequate level and make that system the sole remedy.

Finally, we believe that parties to a product liability dispute should be encouraged to adopt alternative methods of dispute resolution that encourage negotiation and settlement rather than litigation. The growing cost of litigating product liability claims has been well documented. Obviously, resolving disputes over complex issues will always entail some costs, and up to a point, that is an appropriate use of societal resources. But many who are familiar with the day-to-day management of tort claims believe that much of the litigation expense incurred today contributes very little to accurate fact-finding and has minimal, if any, social value. Our goal should be to use the most cost-effective methods of resolving disputes and to expend resources on litigation only up to the point where the additional cost is justified by additional benefits, in terms of fair compensation and efficient deterrence. From this perspective, plaintiffs and defendants alike may have much to gain from using expedited settlement as an alternative to full-blown litigation of product liability claims.

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I hope that this statement is of help to the Subcommittee. We at the Committee for Economic Development appreciate this opportunity to contribute to the public debate on the issues raised here today.

STATEMENT OF ROBERT C. HOLLAND
PRESIDENT, COMMITTEE FOR ECONOMIC DEVELOPMENT

Prepared Answers in Response to Questions Posed by Senator Bryan
Chairman
Consumer Subcommittee
Committee on Commerce, Science and Transportation
United States Senate
April 17, 1990

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1. (a) You expressed concern about the costs associated with litigation, referred to as transaction costs. What types of costs do you include in this phrase "transaction costs?"

   (b) Do you have any evidence to demonstrate that S. 1400 would reduce transaction costs?

(a) We use the term "transaction costs" to refer to those litigation expenses and related administrative overhead costs incurred by plaintiffs, defendants and courts in the operation of the tort liability system. For plaintiffs and defendants, these include: penalties, legal fees and expenses, claims-processing costs, the cost of working time spent on the cases, and related costs. The public costs of operating the courts are also properly considered as transaction costs.

The above-mentioned transaction costs of the tort system do not include another very important category of costs called indirect costs. One component of these indirect costs is the opportunity cost of additional resources devoted to risk reduction, increased expenditures on research and development to assess remote risks, modifications of product design, quality control, labeling and warnings. Manufacturers are forced to build these costs into the price of their goods. The second component of indirect costs is the loss that results from products being withdrawn or never brought to market because of the daunting costs of protecting against the liability threat. We recognize that in some cases these costs are appropriate because they serve to eliminate inferior or harmful products from the market. However, for other products these costs are not appropriate and have adverse consequences, namely, the reduction in the choice of products and services available to consumers, the loss of employment and profit opportunities for workers and owners of capital, and the subsequent harm to U.S. international competitiveness. These are real social costs, even though they are very hard to quantify.

(b) Since S. 1400 has not yet been enacted and would change several dimensions of the product liability system, it is very difficult to predict from existing evidence how the law would empirically affect transaction costs.

An analytical rather than empirical argument on behalf of S. 1400 is perhaps more appropriate and reliable at this juncture. A uniform federal product liability statute such as S. 1400 would first eliminate much of the forum shopping plaintiffs do under the current system. Moreover, the present diversity in state standards causes costly and inefficient uncertainty for businesses that market goods and services nationwide. By and large, those costs of uncertainty have to be passed onto consumers in the price of the products they sell. Consequently, consumers of nationally marketed products, who live in states with more stable and reasonable standards, nonetheless have to bear the costly expense of the unpredictable and unreasonable standards imposed in other states. A uniform product liability law should cut these costs of state by state diversity.

Moreover, because liability uncertainties should be broadly reduced by the proposed legislation, insurance actuaries should be better able to predict and cost the risks of ventures undertaken by their clients. If experience under S. 1400 shows that there is a significant decrease in uncertainty and in claims frequency and severity, then we would expect these changes to be reflected in a corresponding reduction in insurance premiums over time. Manufacturers would no longer have to raise the price of their goods and services as much to cover the costs of their insurance premiums. The availability of insurance coverage for manufacturers producing higher-risk lines should also increase.

S. 1400 would benefit our nation in one other simple but salient way. Given the current diversity of state laws and court decisions, consumer rights are far from clear and the results of product liability suits are often far from equitable between injured parties. By establishing uniform product liability standards across all states, S. 1400 would reduce the uncertainty that many consumers have regarding their rights when injured by a defective product. Armed with a more consistent set of rules and standards, consumers could better educate and guard themselves against potential risks.

It should be remembered that state legislators have little incentive to adopt fundamental tort reform because they know that in-state residents would bear most of the cost and reap few of the benefits as long as other states have more burdensome standards. Basic standards for product liability therefore need to be set at the federal level, but with enough leeway to allow a role for state legislation to address issues that are specific to the individual state or raised by court decisions within that state. S. 1400 would perform such a function.

2. In your testimony, you made several references to the functions of the courts as the basis for some of the problems you perceive in the current system. For example, you stated that "courts have a built-in bias toward placing absolute liability on a defendant because of the presence of an injured plaintiff" and that jury awards have gone overboard over the past several years. Do you have any factual evidence to support these statements?

Let me first address the issue of the courts' built-in bias in placing absolute liability on the defendant. In the two decades from the early 1960s to the early 1980s, the underlying drift in product liability decisions in the United States was precisely in that direction: a tendency to shift the liability burden toward the defendant, in order to help the injured plaintiff, regardless of whether the defendant actually caused the injury. Fault-based liability has become less prevalent. The theory, of course, has been that the defendant (typically a business) could better bear the expense of the system than could the plaintiff (typically a consumer). It was assumed the defendant could spread the risk without cost, smoothly passing it on through only fractionally higher prices for goods and services. But the evidence demonstrates that such a transfer is not automatic, is far from smooth, and often is not small.

With regard to rising jury awards, we have found that trends in the size of awards (adjusted for inflation) differ dramatically by the type and size of case. A RAND study of jury verdicts in two jurisdictions, Cook County, Illinois and San Francisco, California for the period from 1960 to 1985, is instructive. The data on jury awards for these two jurisdictions painted a picture of trends in awards that parallels a similar trend in the number of suits. In constant dollars, the typical (median) award for auto cases since 1960 has remained relatively stable, but the typical award for product liability cases has more than doubled.

Significantly, awards in the very highest-paying cases rose most rapidly, resulting in even more dramatic increases in the average (mean) than in the typical award, particularly for product liability cases. Between 1980 and 1984, million-dollar verdicts in Cook County accounted for 2.8 percent of personal injury verdicts but 65 percent of all dollars awarded; in San Francisco, they accounted for 3.8 percent of cases and 47 percent of dollars awarded. In the two jurisdictions, between 1960-64 and 1980-84, the average award for product liability therefore increased between 200 and 1,000 percent. Translated into dollars, the mean expected award for product-related cases increased in constant dollars, between 1960-64 and 1980-84, from $56,000 to $575,000 in San Francisco and $76,000 to $414,000 in Cook County.

One last point: the recently released GAO report, entitled Product Liability: Verdicts and Case Resolution in Five States, supports the fact that jury awards have indeed become excessive in the past several years. It reports that in the five states studied, appeals and post-trial settlement negotiations reduced the amount of total jury awards by 43 percent. These reductions occurred in 50 percent of the cases won by plaintiffs and in 71 percent of cases with awards of $1 million or greater. Lastly, appellate courts in the five states reversed or remanded for trial all punitive damage awards on which they ruled. Such statistics clearly indicate that juries in these states have tended to overcompensate plaintiffs in relation to actual injuries sustained.

3. Do you have any factual data to support your claim that the current tort system was the primary cause for the rise in commercial liability insurance premiums?

In 1987, in order to understand the causes of the insurance crisis, the Antitrust Division of the U.S. Department of Justice conducted and published an economic assessment of the affordability and availability of liability insurance. The Antitrust Division, based on its analysis of factual data, concluded that

> "three of the four most commonly alleged causes of the crisis -- collusion among insurers, imprudent business practices and declines in investment income, and state regulation -- are all unlikely to have caused the crisis. In contrast, both theoretical economic analysis and empirical evidence support the conclusion that unanticipated changes in the manner in which tort liability has been established and damages assessed, along with the uncertainty engendered by these changes, are directly responsible for the current affordability and availability problems in property-casualty insurance."[1]

A more recent study prepared by Tillinghast presents empirical data showing the increased costs of various types of insurance, including liability insurance, over this century as compared to a variety of economic indicators, such as gross national product, workers' compensation costs, and social security costs. The study also compares the cost of the tort system in the United States with the costs of comparable tort systems in foreign nations. The Tillinghast study found that U.S. tort costs tripled during the 1980s, while the costs of other social welfare systems rose only half as much.[2]

Finally, Professor George Priest, of the Yale Law School, studied the actual liability insurance costs incurred by a variety of businesses throughout the U.S. and compared those costs with the actual experiences of those businesses in the product liability system. These factual data are discussed in Professor Priest's article entitled "The Current Insurance Crisis and Modern Tort Law." Professor Priest also concludes that the tort system, for several complex reasons, is the primary cause of increased liability insurance rates and decreased availability of liability insurance.[3]

While these three important studies represent a variety of theories about the intricate relationship between U.S. product liability laws and liability insurance costs, they all agree on the fundamental principle that tort costs are the primary cause for the increases in the cost of liability insurance in recent years. These studies also agree on the basic methodology for evaluating insurance cost increases, as explained below.

The enormous increase in costs borne by insurers in the past decade has consumed most of the revenue gained by raising insurance premiums. One caution is that there are many leads and lags in insurance premium hikes, so that the rise in premiums will not perfectly match the corresponding rise in the number of claims and size of awards in any particular span of time.

The most readily available measures of trends in total insurance costs are insurance-incurred losses, including the costs of handling claims (loss-adjustment expense). Although specific data on the losses incurred on product liability policies are not available, product liability losses form a significant component of the losses incurred on general liability policies (for which data are available). General liability losses rose steadily from roughly $3 billion in 1975 to $8 billion in 1983 but increased sharply to $14 billion in 1985. One study estimates that the losses incurred grew at a rate of over 40 percent a year between 1984 and 1986. As a direct result of these losses, insurance premiums rose substantially throughout the late 1980s.

A paper by Scott Harrington in a 1988 Brookings Institution publication entitled Liability: Perspectives and Policy reaches a similar conclusion. The chapter by Harrington, "Prices and Profits in the Liability Insurance Market," details the dramatic rise in general liability insurance premiums in the years 1985 to 1986. Net premiums written increased from $6.5 billion in 1984 to $20 billion in 1986. The report corroborates the large accounting losses reported by insurers during this same period. It also concludes that the total increase in premiums since 1981 can be largely explained by increases in the discounted value of reported insurance losses. The study reports that as a result of these premium increases, the limits of coverage shrank for many insured companies, and cancellations and denials of renewal were particularly widespread for some types of businesses.

The causal link between insurance industry losses and premium increases has been criticized by some who argue that the losses have been artifically inflated by insurance companies in order to justify the premium hikes sought. Although the accuracy of recently reported insurance losses cannot be determined for several years, there are obvious disadvantages to insurers in overstating losses. The market valuation of company stock may be adversely affected. Their ability to raise premiums may not increase and could even decrease.

The large rise in insurance losses through the mid-1980s parallels a similar rise in the size of awards and the number of claims. Both these trends were cited in my answer to question 2.

The cost to insurers of handling claims adds roughly 30 percent over and above loss payments to injured parties. (This is a much smaller increment of transactions costs, it should be noted, than is typical for awards to injured parties won through the courts.) As the number of insurance claims have risen dramatically, so have these handling costs. Moreover, the loss adjustment expense and year-to-year volatility of this expense has also grown in recent years.

1. U.S. Dept. of Justice, An Update on the Liability Crisis, Tort Policy Working Group, Appendix at 1 (1987); see also U.S. Dept. of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (1986).

2. Tillinghast, Tort Cost Trends: An International Perspective 1 (1989).

3. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1524 (1987).

4. You stated in your testimony that imposing liability on defendants that have taken all reasonable precautions serves no positive deterrent function:

   (a) Do you believe that manufacturers who comply with the reasonable safety standards of the industry should be given absolute immunity from liability?

   (b) If so, what recourse does such a system offer to persons who are injured by such products?

(a) Our nation operates on a system of checks and balances, and this should hold for product liability standards as well. The tort system, prior to its departure from fault-based product liability, provided a necessary check on manufacturers who abrogated their responsibility to produce safe products. With the recent movement toward strict product liability, the checking function of the tort system has become largely ineffective, making reliance on other parts of the system more important. Voluntarily formulated industry safety standards are one important part of efforts to ensure product safety because they promote increased industry emphasis on safety and serve an internal policing function that can indentify manufacturers who deviate from their own industry's accepted safety practices. However, we believe carefully set government safety standards are also necessary in a number of areas to properly protect consumers. When such government standards are in place and working well, we believe they provide enough risk deterrence to render the tort system unnecessary for this purpose.

There are already a number of areas in which existing government authorities are properly charged to protect the public interest.

The Environmental Protection Agency (EPA), Federal Aviation Administration (FAA) and Food and Drug Administration (FDA) are examples of federal agencies with the kind of authority, standards, and experience to justify using their safety standards as the primary instruments for controlling risks and injuries resulting from environmental hazards, chemical hazards, pharmaceuticals, aircraft and medical devices. Accordingly, we believe that industry compliance with the standards set by these agencies for product design or warning should be a bar to tort liability except in cases of fraud or suppression of evidence.

Regulation is much more efficient than tort liability for controlling mass hazards with potentially long latent effects. Adding tort liability creates conflicting standards that are unlikely to be more efficient, and it generates wasteful litigation. Establishing uniform product liability standards at the federal level would thereby remove the costly burden to society of paying for such inefficient liability lawsuits. The proposed regulation defense would apply only to those aspects of a product that are in compliance with regulatory standards.

(b) Since zero risk is not an optimal standard for most operations, we must expect injuries to result occasionally even from products that meet regulatory agency standards. The costs of such injuries should be covered primarily through either private first party insurance or social insurance programs (e.g., Medicare, workers' compensation, and the like).

We recognize that a small percentage of the population is covered neither by private first party insurance nor social insurance programs. This is a serious problem that needs to be addressed, but it does not offer a justification for expanding the tort liability system or perpetuating the current product liability system. Expansion or perpetuation of the existing liability system are significantly more costly solutions than the cost of expanding social insurance. Moreover, the current system cannot practically cover all such insurance gaps, but only those involving third party fault.

5. You stated in your testimony that many manufacturers have, in some instances, decided not to introduce a new product or even drop a promising product because of their fears of potential liability. Could you please identify the names of these manufacturers and the specific products that were withdrawn or deferred from production?

I cannot provide a complete list of manufacturers that have cancelled or curtailed product development and/or distribution because of the threat of potential liability because, in many cases, this information is felt to be too proprietary to share publicly. In my own meetings with corporate officials on this subject, I found this concern emerged so frequently that I did not ask for permission to quote the name of the firm or the specific product in question. I believe that this is also true for the 1988 Conference Board survey which has been cited in testimony to this Subcommittee, indicating that over one-quarter of the senior executives polled knew of cases of product curtailment by their firms for liability reasons.

What I can attest is that my remarks on this subject do indeed rest on answers given to given to me and others by corporate officials with clear recollections of cases of this sort in their firms. We do have the benefit of a fair number of instances in which individual firms have felt that they could or should speak out on their particular experience in this respect in explicit detail. A number of surveys and articles have collected many of these instances,[1] and the Congress has learned about many of them through hearings on product liability reform over the past several years.[2] Let me cite some of these instances that seem particularly instructive to me.

While these instances do not represent a scientific sampling of company experience, they do convey a sense of the breadth and the seriousness of the losses to firms, consumers, workers, and society, that have resulted from the intimidating risk of product liability.

Although the Committee's question only asks for information about products that have been discontinued or withheld from the market due to liability fears, I can identify three businesses that closed their doors entirely due to product liability costs: 1) Nissen, incorporated in the state of Iowa, the world's largest maker of gymnastic equipment, closed its doors in February, 1989 because of liability costs. The corporation was dissolved on September 29, 1989;[3] 2) WEPCO, Inc., a small business that produced driving aids for the handicapped, ceased operations due to fear of liability despite certification by the Veterans Administration;[4] 3) Proctor & Schwartz, Inc., a textile machine manufacturer, closed its doors after over 150 years in business, because of the costs of defending against 36 product liability suits.[5]

Over the course of past hearings on product liability reform, the Congress has heard about many American manufacturers who have removed existing products from commerce or who withheld new products from production because of product liability costs. Some of these companies and products, referred to in testimony at prior hearings and reported in other sources as well, are summarized below. Since 1975, the number of major companies making football helmets in the U.S. has dropped from eight to two -- only Bike and Riddell remain.[6] Spaulding, a major sporting goods manufacturer, has discontinued production of all protective sporting equipment.[7]

The pharmaceutical industry presents some well known examples of products no longer available because of existing product liability laws. G.D. Searle & Co. withdrew the Copper-7 intrauterine contraceptive device from the market although it had a long history of safe use.[8] Merrell-Dow Pharmaceutical Company recently removed its drug Bendectin, used to treat morning sickness in pregnant women, from the market. Used by over 33 million women over several decades, certified as safe and effective by the FDA, Bendectin cost Merrell-Dow $18 million in legal expenses, while it created only $20 million in sales. Wyeth Laboratories abandoned production of the DPT vaccine, leaving Lederle Laboratories, a U.S. competitor, as the sole U.S. manufacturer of the vaccine.[9]

Product liability costs are a problem throughout a broad range of industries, as the following examples illustrate. Puritan-Bennet Co., of Virginia, stopped making anesthesia gas machines to avoid the risks of potential product liability suits.[10] Cessna stopped making the small airplanes used by the Ohio State Highway Patrol for the better visibility they provided. Cessna stopped production because it could no longer afford the potential liability from small planes like those it was selling to the

Ohio police.[11] Both Beech Aircraft and Piper Aircraft suspended production of light single- and twin-engine aircraft.[12] Uvex Winter Optical decided to no longer manufacture and distribute motorcycle helmets and ski racing helmets because of liability costs.[13] American Motors stopped production of the Jeep CJ model because product liability insurance became too expensive to justify keeping the model in production. Dyneet Corporation stopped production of its helicopter clutches, although it had not had any product liability claims filed against it, because it could no longer afford to purchase liability insurance for the clutch.[14]

One of the most frightening effects of U.S. product liability laws on business is the insidious way in which they force manufacturers to keep promising new products off the market. Union Carbide developed a suitcase-sized kidney dialysis machine that could be used at home. Due to the company's analysis of the potential liability from marketing the machine, Union Carbide decided not to market the machine and sold it to a foreign company. Union Carbide also decided not to develop a line of medical devices related to intravenous treatment.[15] Monsanto developed a substitute for asbestos, a phosphate fiber that a senior Monsanto scientist called safe enough for use as a food additive. Monsanto decided against marketing the product because it feared the asbestos bar would attempt to use legal theories and trial techniques developed in asbestos litigation against the asbestos replacement.[16]

Livermore Lab in California discovered that a particle accelerator, developed for a weapon system, could be used instead of harmful pesticides on newly harvested crops to kill insects, larvae and parasites. Livermore decided that the technology was too risky under current product liability laws so the potential new use was abandoned.[17] FMC scientists developed a chemical process for speeding up decomposition of hazardous materials. The new process could have been used to clean up underground storage facilities, but because of a very slight risk that the chemical might migrate in unknown directions, the company decided that the potential liability would be too great to make marketing of the product worthwhile.[18] Unison Industries developed an electronic ignition for use in piston engine airplanes but dropped the project because they were concerned that the innovative nature of the ignition would create substantial liability problems.[19] Genentech, one of the leaders in the new biotechnology industry, has decided against any plans to develop and market a new vaccine for AIDS, despite its renown for genetic engineering. Genentech made this decision because it is unable to bear the costs of potential liability from such a vaccine.[20]

Unfortunately, the products and companies mentioned above represent only those who are brave enough to go on record as having suffered serious indirect effects from our current product liability system. Many others have suffered similar set-backs, but, for a variety of reasons, are reluctant to go on the record about their experiences. Beyond these tangible examples are many more instances of how U.S. product liability laws stifle the drive to innovate and compete in product development. These latter instances go undocumented and unknown altogether because they involve decisions made at the very heart of the innovative process -- at the drawing-board and in the offices of research and development managers. We will never know how many creative and beneficial products were abandoned while still in the minds of the inventors simply because of fear of liability.

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1. See Mahoney & Littlejohn, Innovation on Trial: Punitive Damages Versus New Products, 246 Science 1395 (Dec. 15, 1989); Cortese & Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us At Our Own Game?, 9 U. Pitt. J. of L. & Commerce (1990) (publication pending); McGuire, The Conference Board, Research Report No. 908, The Impact of Product Liability (1988); Huber, Liability: The Legal Revolution and Its Consequences (1988).

2. Hearings on Product Liability Reform, Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. (May 5, 1987); Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 2nd Sess. (May 20, 1986).

3. Transcript, "20/20," ABC-TV, aired Oct. 20, 1989, at 7. The dissolution of Nissen was confirmed by the Office of the Secretary of State of Iowa in a telephone conversation, and is also reflected in a comparison of the Director of Corporation Affiliations, Vol. I, 1990, at 510 with Directory of Corporate Affiliations, 1989 at 480.

4. McGuire, The Conference Board, Research Report No. 908, The Impact of Product Liability 18 (1988).

5. Statement of the Honorable Carroll A. Campbell, Jr., Cong. Rec. E2897, June 14, 1983.

6. Hearings on Product Liability, Before the Consumer Subcomm. of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 2nd Sess., at 7 1986) (statement of Larry McClain, for the Sporting Goods Manufacturers Association); see also Stevenson, The College Sports Industry, Athletic Supplies Stakes are High, New York Times, June 10, 1986, B, at 9, 13.

7. Malott, Commentary: Product Liability System Hampers Competitiveness, Financier, at 30 (Jan. 1988).

8. Mahoney, *Innovation on Trial: Product Liability v. Global Strategy*, at 7, Chairman and Chief Executive Officer, Monsanto Co. (1988).

9. *Hearings on Product Liability Reform, Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess., at 5, May 5, 1987 (statement of the U.S. Chamber of Commerce).

10. Schwartz, *Product Liability, A Crisis Well With Us*, Across the Board, Oct. 1987, at 16.

11. Transcript, "20/20", ABC-TV, aired Oct. 20, 1989, at 2-3.

12. Pagano, *Liability Costs Cut into Airplane Sales*, Los Angeles Times, June 30, 1986, Part 4, pg.1, col. 3.

13. Testimony on Product Liability, *Hearings Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess., May 5, 1987 (testimony of John B. Curcio on behalf of the National Association of Manufacturers, at 3).

14. Product Liability Coordinating Committee, *U.S. Product Liability Laws: A Crisis in International Competitiveness*, at 6.

15. Mahoney, *supra* note 6, at 8 (referring to a speech by Warren Anderson, at the Annual Meeting of the National Association of Casualty and Surety Executives (Oct. 7, 1986.)

16. Mahoney, *supra* note 6, at 3-4.

17. Product Liability Coordinating Committee, *supra* note 14.

18. *Testimony on Product Liability Reform, Hearings Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess., May 5, 1987 (testimony of Robert H. Malott, Chairman and Chief Executive Officer, FMC Corporation, at 9).

19. Transcript, "20/20," ABC-TV, aired Oct. 20, 1989, at 5.

20. *Impact of Product Liability on the Development of New Medical Technologies*, American Medical Association Resolution 6 (A-87), Proceedings of the House of Delegates, 137th Annual Meeting, at 83-87 (1988).

Senator **Bryan**. Chairman Hollings has indicated he has to go to another meeting. So, let me yield to him first and then we will proceed with questions.

The **Chairman**. I thank you, Mr. Chairman, for your courtesy, and I thank each of the witnesses. They make very forceful statements.

Justice McKusick, we really appreciate your appearance. We know justices of the state supreme courts do not like to involve themselves in politics in Washington. Box and I like to, as old state legislators. So, you only come under a serious circumstance and a misgiving and a frustration that I share. Preemption does not solve, but rather complicates, and what it intends to solve, it does not. It is limited in its solution.

I find, obviously, Mr. Box, your statement outstanding. You have alerted them to some of the defects. I do not want amendments like comparative negligence. It should be contributory in here, but you can find out that they really have drawn it without a Federal question and put in comparative without contributory. Those who practice in the field realize that it is a gerry-built kind of Chamber of Commerce bill that is just jammed together, and everybody is for it.

They asked a small business leader the cost of insurance, but, Mr. Holland, that is not the case at all with your Committee for Economic Development. "The property, casualty insurance crisis is largely over," said "Business Week," that is representing the Committee for Economic Development and all business people. They would go out of business if they did not represent them.

"The insurance crisis abated without help from an overhaul of the Nation's civil justice system," which verifies, Mr. Box, your statement if it ain't broke, don't fix it.

"The insurance industry enjoyed record profits in 1986. And the American Enterprise Institute, a large business group, study found that punitive damages for the cases studied were insignificant."

And, Mr. Noye, let's say we passed this bill as you suggest. You still say that you want your bill in Pennsylvania. Is that correct? Because this would not take care of regulation?

Mr. **Noye**. No, Senator Hollings. The contention of the American Legislative Exchange Council is that state product liability laws will still be needed in some cases and that they will dovetail nicely with—or we hope to dovetail nicely with the Senate bill.

The **Chairman** [presiding]. Well, all four of you are very good to wait. I know it has taken a long time this morning. We have gotten behind schedule, and we do appreciate your appearance.

Senator Rockefeller.

Senator **Rockefeller**. Thank you, Mr. Chairman.

Chief Justice McKusick, I would like to address a couple questions to you. You say, sir, in your testimony, "We already have a high degree of uniformity on major points of tort and warranty law achieved over many decades through tens of thousands of cross precedents."

But isn't it true that the present rules, in fact, that govern product liability have been developed really only over the past 15 years?

Mr. McKUSICK. Twenty-five perhaps, Senator, yes. There have always been product liability rules, but perhaps the modern law has been developed in the last quarter century. In Maine at least, we had very heavy activity, both court and legislative, in the 1960s, which is 25 years ago. It is in this time frame that there has been very heavy development. You're right.

Of course, I did hear Senator Bryan refer to *Rylands* v. *Fletcher* for strict liability which goes back, of course, to the mid-19th century. But my answer to you, Senator, is yes. There has been very rapid development in both the legislative——

Senator ROCKEFELLER. It is rapidly changing.

Mr. McKUSICK. In product liability law, yes.

Senator ROCKEFELLER. And then stemming from that, isn't it true that really far from representing uniformity, this evolution and experience over the last 15 or the last 25 years, that the 50 different state product liability systems present a product manufacturer with an enormous array of difficulties?

Mr. McKUSICK. I would not accept enormous, but there is variation among the law. And this is not the only area where that exists, of course. But there is variation within the law, undoubtedly. That cannot be contradicted, no.

Senator ROCKEFELLER. Some do say that one Federal law will not necessarily give us any more uniformity than we have now. Is it also not possible to say that 55 state courts interpreting one Federal law is probably simpler and better than 55 states interpreting 55 states'? I mean isn't there a certain logic that over a period of time that 55 states trying to relate to one Federal law, that the chances are there is likely to be more uniformity and predictability?

Mr. McKUSICK. I think in fairness one would have to accept that, yes. There would be some considerable period of adjustment to this new regime, but I cannot argue with that.

Of course, the easiest way of all would be to go to the ultimate and have all product liability, just because almost everything is in interstate commerce, Federal law and let the Federal courts handle the product liability cases. At least within each circuit you would have a final arbiter and so on.

And I suggest to you that to some extent you have to make very definite structural changes. If you want to federalize the product liability law and really do it right, you are going to have to depart from our dual judicial system, which we have just celebrated the 200th anniversary of. When you sort of straddle, you have many of the disadvantages of both systems.

Now, I do not argue with you on the point of your question, though. To some degree, one would hope in the course of time that these 55, 56 different tribunals plus the 12 circuit courts would read the same. Like in a civil code country, all they have to do is just look at the language and the answer is there. But that we know is not the case. But you would expect there would be some uniformity on these limited areas that S. 1400 addresses.

Senator ROCKEFELLER. And S. 1400 you would agree does not give jurisdiction over product liability cases to the Federal courts. It does not do that. The jurisdiction remains with the state courts.

Mr. McKUSICK. Well, in part the complaint of the Conference of Chief Justices is the fact that there is, other than the United

States Supreme Court, no final arbiter of these rules. If they are going to be Federal rules, you have only one arbiter of those rules. And that is why I suggest to you that in many ways, if you want to federalize the common law and statutory law of torts, you have to make some structural changes in order to really do it right.

Senator ROCKEFELLER. Well, the question of doing it completely right or doing it better.

Mr. MCKUSICK. Indeed, the primary recommendation of the Federal court study committee that is now at work is to eliminate diversity jurisdiction to get the Federal courts out of this business.

Senator ROCKEFELLER. But I am thinking of what Mr. Box said that a product—it sort of like you make a product in West Virginia and, well, a manufacturer will try that product, will shop for a forum, so to speak, and will try that product in, let's say, the State of Arkansas. I have no idea what their laws are. That is not exactly the way manufacturing works, is it, Mr. Holland?

When you manufacture products, it is not that you wish to try them or sell them in Arkansas. By definition, their being made in West Virginia has nothing to say about where they are going to go. They are going to go everywhere. And, therefore, confusion is an integral problem for you. You are not just going to send your products to a couple of states that have product liability laws that somehow give your counsel a sense of ease. That is not the way manufacturing works, is it?

Mr. HOLLAND. No, not at all. And the key question here is not so much the manufacturer shopping for a forum as it is the allegedly injured party looking around and thinking "in which court can I sue that I have the best chance of winning?"

Senator ROCKEFELLER. Yes, that is a different type of forum shopping.

Mr. HOLLAND. That is the kind that worries the manufacturer.

Senator ROCKEFELLER. I understand that, but I was getting back to his point.

Mr. HOLLAND. No. I understand you were, Senator.

Senator ROCKEFELLER. It is not realistic in my judgment, that manufacturers do not do business that way. And obviously forum shopping on the part of the consumer or the injured person has its own problems.

I do not understand, Mr. Chief Justice, why it is that you can defend 55 state courts and 55 state product liability laws as being essentially somehow useful, at least that you would be able to admit that having a uniform national, Federal law off of which state laws would develop, play and evolve is not a radical idea, but is in fact somewhat logical. You have granted me the point. I just wanted you to do it again.

Mr. MCKUSICK. Well, all that we are saying is—and again I would repeat—that we are not directing ourselves and the conference is not directing itself to the specific standards and the desirability of those, nor do we for one iota have any disagreement with the principle of uniformity. What we simply urge upon you, the charge that has been put on state courts in a whole lot of areas other than this, the whole body of the common law and the whole body of tort law, of which this is only one small part, and which remains to be administered by the state courts—indeed, in the very same cases, you may have a product liability case involving drugs, for example, where you may have a claim of defect in the drug, but you also may have a malpractice claim against the doctor administering the drug that S. 1400 would have nothing to do with.

All I am suggesting to you is there are two areas where the Conference of Chief Justices is very anxious to see action: number one, in the improvement of our state courts, and in the improvement of the uniformity or of the law that they apply. And that seems to us to be the area where the progress ought to be made because of the fact that in our dual judicial system we have the obligation to administer great areas of the law, and this is one of them, tort law. And S. 1400 gets into one little corner of it.

We suggest that state courts would be benefited by having greater uniformity. That is what we try to do in our decisions. I always am troubled about my court getting far out of the mainstream. If we have a new question of law arising—it has never come up in Maine before, and we have, of course, a relative small body of law being a smaller state—we always ask what is the mainstream view. And we try to be in the mainstream.

I would suggest that that is where the effort ought to be, number one, to improve our state courts because they handle over 95 percent of all the litigation in this country, and their quality is the critical thing. And second is to achieve this desirable uniformity. Number one, state courts themselves have an obligation there, and secondly through the legislative arena.

Senator ROCKEFELLER. I thank you, sir.

Mr. MCKUSICK. That is a long-winded answer to your question, Senator.

Senator ROCKEFELLER. No. It's a fair answer.

You know, there is something that bothers me about this whole history on product liability—and I have only been here five years, so I guess I could be more bothered if I had been here longer—that somehow we are setting up, Mr. Chairman—we are for lawyers or we are against lawyers. We are lawyer-bashing or we are not, that we are pro-people or we are anti-people. And this whole thing has a history which is ideological which I think works to the disadvantage, frankly, of those of us who espouse S. 1400 because it is so easy to push buttons that bring up certain emotions.

That is not my purpose in all of this. When I talked at the beginning about competitiveness—and I think somebody later on said that that was not particularly important. I frankly am very concerned about the future of this country economically. And there are a lot of people who are a hell of a lot more experienced than I am who are a lot more concerned about that.

I spent three years of my life at a Japanese university and learned their language. I know that country very thoroughly, followed it over the years. And I would just suggest if people think that Japan is a tough competitor, wait until 1992 when 13 European countries, soon to be followed I would assume by Switzerland and Austria in their own good time, are a force of 350 million plus with a tradition which is more protectionist even than that of Japan because they deal in direct tariffs, et cetera, plus a whole ethic of another society with tremendous concentration on math and science and engineering where they are turning out disciplined people who are tremendous not only at basic research, but also at applied research, and commit a longer term view than we do in this country. They are going to have one uniform product liability for all of those countries. Forget West Virginia and Virginia. As between all the 13 countries or 15 countries, there is going to be one uniform product liability law.

Mr. Holland, I would just like you to make a statement that this is not a kind of a pursuit where one side wishes to win or it can beat up on the other side or somebody can slash me or Senator Hollings for either being anti or pro-consumer or anti or pro-business. Is this not a serious matter that we have before us that warrants our intervention in terms of this bill? And if so, I would like to have you make that case. Don't just talk about additional costs. I am talking about basic research and development, the basic instinct to take risks, the fact that I think there is only one company that makes vaccines anymore, that Monsanto has a substitute for asbestos which they do not even dare test. What is at stake for us in this thing economically?

Mr. HOLLAND. Senator, your words do a lot to put concrete meaning into a term I used in my opening remarks, "indirect costs". I was trying to be very brief for the benefit of the committee.

As we see it, the kinds of things you are talking add up to a very significant handicap on American business as it tries to compete in today's very competitive international marketplace.

Senator ROCKEFELLER. Be specific. Be specific, please.

Mr. HOLLAND. American business is handicapped not only because of the actual costs it pays for liability insurance and lawyers and so forth, but handicapped in the inhibitions it feels because of the unpredictability of the relatively high average of costs compared to other countries and, in addition, the unpredictability of our current system of product liability. In terms of the changing way product liability has been treated in this country, there have, to be sure, been spurts and lulls. We have been in a bit of a lull after that big spurt in 1986–1987.

CED has looked at the situation carefully. We have yet to see any fundamental corrections. We do see some improvements around the edges and some that are helpful in some individual states. But we still see the same fundamental flaws there as before and they are capable of giving us a new outburst of greater variance, greater unpredictability and greater costs again in the future.

Those are very serious problems for a company deciding whether or not to bring out a new product and whether or not to put a new plant to produce that product in this country, inside the European Community or somewhere else. And there are jobs tied to those decisions. There is income creation tied to those decisions.

Here we are getting into the basics of how this country creates the standard of living enjoyed by its people—its workers and its consumers. By the effects I have just enumerated, our existing tort liability system is cutting into the muscle of the American industrial capacity to compete and to produce and to pay workers and to satisfy consumers.

Furthermore, this situation is getting more serious as time goes on because the world is becoming increasingly interdependent. You rightly point out the European Community as an example of this increasing globalization. What that means is that differences within the United States and between us and the rest of the countries, that two or three decades ago would not have made much difference, now make a great deal of difference. These forces of globalization are going to get stronger and stronger as we see it. Therefore, we need to pay increasing amounts of attention to the wedges we are creating, i.e., the handicaps you suffer producing in this country compared to others.

We have some very important strengths, but our strengths are not so strong that you can keep loading burdens on our American industrial system. If you place more and more burdens on American companies relative to what they are facing in the rest of the world, we will start to suffer job loss, income loss, standard of living loss, loss of world leadership. All those things are part of what are touched on by this particular issue of product liability.

Senator ROCKEFELLER. Mr. Chairman, would you indulge one more question from me also of the Chief Justice? Then I will forever hold my peace.

Senator BRYAN [presiding]. Absolutely, Senator.

Senator ROCKEFELLER. I know you want to talk, Mr. Box, but I have to get my question in. Then if the Chairman wants you to talk, you go ahead and talk.

Mr. Chief Justice, you say in your statement—and I will quote—that "adopting a Federal product liability bill would only complicate matters because it would lead courts to," as you say, "interpreting and applying a mix of state and Federal law in the same case." You say that.

You suggest that there would be something disruptive in courts having to apply both the Federal product liability standards as well as state tort law standards in the same case.

But isn't that really what goes on in courts anyway all the time? In a lawsuit against a doctor and a drug company, or a driver and an auto manufacturer, the court or the jury will often have to apply a negligence standard to one defendant and a strict liability standard to another? Judges and juries seem to have no problem applying these two different state law standards. So, why would it be any more difficult for them to apply a state law standard and a Federal law standard in the same case because it happens to be called product liability?

Mr. MCKUSICK. Well, you are right. It is obviously more difficult, but I do not want to make too much of that.

I think I said it would only complicate it. It would complicate it.

I would suggest that the degree of uniformity and the degree of certainty that would be added is much less than you anticipate. At least it would be for a considerable period of time because of the absence of anybody having the final say here except the United States Supreme Court.

Senator ROCKEFELLER. But the considerable period of time is absolutely critical. What you are saying is, yes, it would be difficult for a while, indeed, as other things are difficult, that it would get better, and that a long journey starts with a couple of steps.

Mr. MCKUSICK. I would recognize that. I think that is fair. In time one would hope that all the questions of construction among these 55 plus 12 jurisdictions, 67 jurisdictions—any significant questions on how these standards would be applied would be worked out uniformly, or else a case would go to the U.S. Supreme Court and would be decided I suppose ultimately.

Senator ROCKEFELLER. Thank you, sir. Thank you very much.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Rockefeller.

Mr. Box, we give you an opportunity for a brief response, and then I am going to have a chance to ask a few questions.

Mr. BOX. I am going to try to put this in about 30 seconds, Mr. Chairman.

Senator Rockefeller, I appreciate your concern about competitiveness between American industry and foreign industry. But I submit to you that preemption of state product liability laws is not going to address that problem. If the question is the American market right now with diversity among the various states, foreign and domestic companies compete on an equal footing in Alabama, on an equal footing in New York, on an equal footing in Delaware, and every state. If the problem is competition in Japan or competition in Europe between American companies and foreign companies, there is nothing that this bill is going to do to address that.

Senator ROCKEFELLER. Mr. Box, in rejecting that statement, please understand that I am not so naive to think that the product liability laws at a Federal level would suddenly dissolve the trade imbalance between the United States and Japan.

What I am simply saying is that along with more emphasis on math and science, along with balancing this Federal budget deficit, which we continue to play mirrors and fool around with in this city and do an incredible disservice to this country, along with the ethic of longer term thinking, and along with a 12 year old, how is it that a 12 year old kid wants to be an engineer, which is called applied research, which is why other countries do better? We are so good at basic research, and then they take it and they do the applied research.

Now, at some point if you are 12 years old, you are going to aspire to something. If you want to be an engineer, you have to get hooked by about the time you are 11 or 12 years old. You have to have a role model. And that role model has to be, if you are going to be an engineer, an engineer. You are not going to have that as a role model because engineers stop halfway up the corporate ladder because they never get to the top. It is the lawyers, the accountants and the marketing specialists that do it.

I am not trying to say this is going to solve our problem. I am saying it is one step, but it is an important step.

Mr. BOX. I agree, Senator, but what I said at the very beginning is that you need to take those other steps first.

Senator ROCKEFELLER. Don't play that game. Don't play that game when you say correct all the world's problems before we do this. We have to solve all of these problems as we can. Where we can take a step, we take a step. Where we can do something in math, we do something in math. Where we can reduce the budget—I voted for Gramm-Rudman. We reduced that. We each do all we can, but you do not wait for the world to be perfect before you make it perfect plus five.

Mr. Box. The two biggest problems that you just mentioned are the deficit and education. And this bill is not going to address either of those. All I ask is that you allow those options to work before you preempt the states in the area of tort reform and product liability. Do what you are able to do first before you take away our abilities.

Senator **Rockefeller**. Like reduce the budget deficit. We are good at that, aren't we?

Senator **Bryan**. Thank you very much, Senator Rockefeller.

Senator Rockefeller talked about hot buttons concerning the competitiveness issue. It's a hot button with me. He, I think, correctly points out that we are in this global village and the competition is going to be ferocious.

If we think the Japanese were tough in the 1980s, and they have been, I was just in West Germany, Senator, earlier this year, and the West Germans, with one-fourth of our population, one-half of the population of Japan, working a 37 hour work week with five weeks of paid vacation a year with a full range of the benefits that we are accustomed to as part of the fringe package in America, produce more goods and services for export in the world than do we or the Japanese. And we know how effective they are. And they look like they are going to be augmented by another 17 million of their country cousins pretty soon. That is going to be another steroid shot for them as far as competition. So, they are going to be tough. And so, we are concerned.

So, let me focus the question on something that has been discussed today on which I confess I do not have a great deal of knowledge.

It has been argued by the proponents that one reason that we need to do this is that EC 1992 is going to develop a uniform product liability system within the European Community, and therefore we need to be sensitized to that in light of the considerations which Senator Rockefeller articulated I think so effectively and so persuasively.

Now, I am told—let me make that disclaimer. I practiced a little law once, no product liability law, but the Justice I think knows what I am saying here. I make a disclaimer that these are the facts, but here is what I am told.

I am told the directive that has been discussed and debated that will create this uniformity in fact enhances the rights of consumers to bring lawsuits and prevail; that among other things, it introduces for the first time in some European judicial systems the concept of strict liability, which we have discussed much today; that the directive expands the potential scope of possible defendants; and finally, that the directive establishes the concept of joint and several liability, which has also been discussed.

If that is true, underscore, italicize the word "if", without saying that that destroys the underpinnings of the entire argument, it does seem to me that that at least undercuts it a bit.

Mr. Holland or Mr. Noye, who are proponents of the legislation, you may want to enlighten me as to whether this information that I have been provided is incorrect or at least different than you understand.

Mr. HOLLAND. Senator, I am no expert on that internal draft being discussed inside the community.

Senator BRYAN. No, I am certainly not either.

Mr. HOLLAND. But my understanding of it and my understanding of what we are trying to do here is not to reduce the dollars that flow to the injured parties, but to try to cut down this whole collection of transactions and overhead and indirect costs. They are such heavy additional baggage for our society.

Senator BRYAN. I understand.

Mr. HOLLAND. Some of the steps being taken inside the European Community will give them some efficiencies in its legal system that will reduce somewhat their transaction costs relative to the amount actually delivered to the injured party. Other steps will work in other directions.

On balance, I think the chance that it will reduce the differences from jurisdiction to jurisdiction within the Common Market will be reduced is very high. And reducing those differences in turn reduces the unpredictability and the uncertainty of what is going to happen when you begin to sell into that European market. I believe it will be an enhanced competitive advantage against U.S. firms.

Senator BRYAN. Mr. Holland, if I could ask you or your group and give you the opportunity, would you supplement the record with your comments on this directive? I do so to build the record. We are going to have some subsequent hearings on this bill, but this information was just provided me. I again do not make an assertion that it is correct, but if indeed that is the focus or thrust of the directive, I think we at least need to have this as part of the record. Acknowledging that you do not come here as an instant expert on EC 1992 directives—and I certainly accept that. I am certainly not either, but could you provide some additional information?

Mr. HOLLAND. If you could supply me with the directive, I'll try. That is the best I can do.

Senator BRYAN. I would be delighted to.

[The following information was subsequently received for the record:]

CED

Committee for Economic Development

1700 K Street, N W
Washington, D C 20006
(202) 296-5860

Robert C Holland
President

March 15, 1990

The Honorable Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science
and Transportation
United States Senate
358 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

During the February 22, 1990 hearing on S. 1400, the Product Liability Reform Act, you asked me to submit additional testimony concerning the European Economic Community's plan to implement a uniform product liability law by 1992. This letter reviews the EEC's Directive on Product Liability, a copy of which is attached.

In July 1985 the Council of Ministers of the EEC adopted Directive 85/374/EEC, which set forth product liability principles to be applied uniformly across the twelve member states of the Community. The Directive did not attempt to totally rewrite the product liability law of the member states and Article 13 of the Directive expressly provides that the Directive does not preempt any existing law. The Directive instead superimposes a new uniform set of liability rules over the existing law. A plaintiff may procede under a member state's existing law, or under the new liability rules established by the Directive, or both. It is expected, however, that plaintiffs will rely heavily on the Directive's new provisions and that accordingly product liability law will become more uniform across the member states of the Community.

Originally, the member states were directed to implement the laws, regulations, and administrative provisions necessary to comply with the Directive by 1988. This date has subsequently been moved back. To the best of my knowledge, five nations -- the United Kingdom, Italy, Greece, Luxembourg, and Denmark -- have implemented the Directive to date and the EEC is acting to attain prompt implementation by the other member states.

The Directive is perhaps best known in the United States for its provisions establishing strict liability for defects (Articles 6) and joint and several liability among defendants (Article 5). Article 6, read in conjunction with Article 1, establishes that a plaintiff must prove only that a product "does not provide the safety which a person is entitled to expect" and need not prove any negligent act by the producer. This provision modernizes the law of several of the member states where proof of negligence is still required to recover in tort. The Article in effect adopts the principle of strict liability that is already well-established in the United States and is embodied in § 402A of the Restatement (Second) of Torts.

Article 5 establishes that defendants "shall be liable jointly and generally" for any damages within the scope of the Directive. Under Article 9, however, the provisions of the Directive do not apply to "non-material damage." Thus the Directive establishes joint and general liability only for direct economic loss and does not include either punitive damages or the "noneconomic" damages covered by Section 306 of S. 1400. These damages continue to be governed by the laws of the member states, which are considerably less favorable to plaintiffs than American law. Thus, even with the joint and several liability provision of Article 5, a plaintiff's recovery of damages from multiple defendants is more limited in the European Community than it would be under Section 306 of S. 1400.

Apart from these two provisions, the Directive contains other provisions similar to provisions in S. 1400. Articles 10 and 11 establish uniform time limitations on liability similar to those proposed in Section 304 of S. 1400. Article 10 establishes a statute of limitations of three years beginning on the date the plaintiff became aware of or should have become aware of the injury, the defect, and the identity of the producer of the allegedly defective product. Section 304 of S. 1400 would establish a two year period. Article 11 establishes a ten year statute of repose for all products beginning on the date the product was put into circulation. Section 304 of S. 1400 would apply a 25 year statute of repose only to capital goods.

Article 8 provides that a manufacturer's liability may be reduced or eliminated entirely if the plaintiff's fault has contributed to his injury. This provision embodies the comparative negligence principle accepted by the vast majority of American states and is consistent with the more limited provisions of the drug/alcohol defense found in Section 307 of S. 1400.

Article 7 of the Directive establishes a broad government standards defense, relieving a manufacturer of liability when the alleged defect "is due to compliance of the product with mandatory regulations issued by the public authorities." S. 1400 contains a much more limited analogue in Section 303(c), which establishes a government standards defense -- for punitive damages only -- for drugs or devices given pre-market approval by the FDA and for aircraft given pre-market certification by the FAA.

Moreover, in some additional ways also, the Directive does considerably more to reduce extremes in manufacturers' product liability than do the reform proposals included in S. 1400. Thus, under Article 7 of the Directive, a member nation has the option of adopting a "state-of-the-art" defense whereby a manufacturer cannot be held liable if it can show that "the state of scientific and technical knowledge at the time when [it] put the product into circulation" would not have permitted it to discover the alleged defect in the product. Article 16, in addition, gives a member state the option of imposing a cap on a manufacturer's total liability for damages caused by a single defective product line.

In sum, the provisions of the EEC's Product Liability Directive, while differing in their details from the provisions of S. 1400, move, on the whole, in directions entirely consistent with them. The Directive and S. 1400 both recognize that greater uniformity of product liability law is desirable, both establish uniform rules in certain key areas while deferring to the law of the constituent states in other areas, and correspond to a surprising degree in the nature of the rules they establish. I would respectfully submit that the approach of the EEC's Directive provides strong support for the moderate reform approach contained in S. 1400.

In terms of the competitive advantage provided to the European manufacturers by their typically significantly lower product liability exposure in Europe, I judge the EEC Directive on Product Liability will lead to somewhat higher but more uniform and more predictable product liability exposure that has prevailed heretofore among the European countries, and hence on balance will still constitute a net competitive advantage over the corresponding liability exposure faced by U.S. firms in this country.

Sincerely,

Robert C. Holland

Mr. **Holland**. Mr. Chairman?

Senator **Bryan**. Go ahead, sure.

Mr. **Holland**. Perhaps I could help the committee by trying to clarify a bit.

Senator **Bryan**. Well, let me ask some questions and then we will give you time for clarification. That is the joy I guess of being here at the end when kidneys and survival are really the critical factor.

Justice McKusick, you are a man that sees the judicial system in your own state. You see that lawyers that appear before the bench. You see the system. It is pretty hard to argue that the system works perfectly insofar as the tort liability system in this country, isn't it?

Mr. **McKusick**. Of course it is. It is not perfect. On the other hand, it is a pretty good system. We always have to work to improve it, but there are not many countries that have anything very much better.

Senator **Bryan**. Well, aside from the merits or demerits of this bill—and you were very careful in your testimony to set that aside—how well does the system work? Does the system in your judgment from your perspective adequately protect the consumer? Does it adequately protect what is clearly in our best interest, to encourage innovation, new product development, the competitiveness issue here, recognizing that there is a scale of values that you have to balance? But you see the system as it works every day in your own state.

I have some concerns frankly that Senator Rockefeller and others have raised in terms of the costs that are imposed. I do not want to substitute a Japanese or a European standard per se until I know a little bit more about what they provide. But tell us. What is your assessment?

Mr. **McKusick**. This goes beyond the scope of my testimony, but I certainly would not say that there are not real problems that have been identified here at all. I do not quarrel with that one iota. I guess all that I am suggesting is that preemption of state law is not the way to go. That is all I am suggesting.

Of course, the size of these transaction costs is troublesome, and workers' compensation delivers more of the dollar. Why? Because way back in the early 1900s we decided to go to an administrative system for doing that. Now, that is one way you could abandon the present system and go to an administrative system on product liability.

Senator **Bryan**. Is that something that should be considered, if not at the Federal level, at the state level?

Mr. **McKusick**. I am now about to be an instant expert apparently.

Senator **Bryan**. We are not here to try to put you on the spot, Justice, but you are right there on the firing line. And sometimes those of us on the beltway cannot see the forest for the trees. I think that criticism is often directed at us. Share with us what ought to be done with that system.

Mr. **McKusick**. I suffer from the same disadvantage of being too close to the forest to see the trees.

But I think in general the civil justice system is working relatively well. And if you want to have a judicial solution for it, the only point of my testimony was that help the states do the job rather than—I perhaps used a colored word when I said "tinkering"—tinkering with the tort law of the states. I suggest that is what S. 1400 does.

Senator **Bryan**. Let me suggest a different adjective. What kind of surgical changes, if any, would you suggest ought to be made, if any? Or do you think the system on balance works so well that frankly we ought not to do anything with it at the Federal level? That is essentially your testimony as far as preemption.

Mr. **McKusick**. Again, I am personally a great believer in uniformity. I was for many years a commissioner on uniform state laws and an officer of the national conference. And they do great work, and great strides in the direction of uniformity have been achieved through that.

This goes philosophical, but if you are going to go into this area, you also are robbing the states of some sense of responsibility in the area. And if you are going to enact S. 1400, then I would think as a practical matter that would put a damper on what is called tort reform in the states in this area of product liability.

Senator **Bryan**. I appreciate very much your testimony. I would only say by way of partial response if Mr. Noye's experience in the Pennsylvania experience is illustrative, apparently they have labored mightily over the years for changes and have been unable to accomplish them. So, perhaps that is a kind of response.

But Senator Kasten has been most patient as Senator Rockefeller and I have unburdened ourselves this morning on our own views on this issue. He has been waiting for 10 years. So, let me defer to him. Senator?

Senator **Kasten**. Mr. Chairman, thank you. I do not want to ask a lot of questions here. I understand that there is another panel and we have all schedules.

I was asked by Senator Pressler to address a question to Representative Box. Are you aware of the fact that the South Dakota legislature has passed a resolution calling on Congress to pass a uniform product liability law? And are you familiar with any other states doing the same?

Mr. **Box**. No, sir, I am not.

Senator **Kasten**. Evidently the legislature in South Dakota has passed such a resolution.

Justice McKusick, if we were here talking about the Uniform Commercial Code, would you be here arguing against it with all the same arguments that you are using with regard to product liability and tort reform?

Mr. **McKusick**. Exactly not for exactly the reasons that I have stated here, that is, uniform action brought through the National Conference of Commissioners on Uniform State Laws through the states. That ought to be energized.

Senator **Kasten**. Are you aware of political action committees, generally speaking?

Mr. **McKusick**. In general, yes.

Senator **Kasten**. Specifically are you aware of the activities of the trial lawyers with regard to political action committees?

Mr. McKusick. In general, I am.

Senator Kasten. What Mr. Noye and Mr. Box could attest to and I could for Wisconsin, is the difficulty in enacting the uniform product liability law that was suggested by the Carter Administration in 1978 or 1979. Every single state legislator was hammered on and every single state legislature tried and failed during that effort. If we had adopted the uniform law in 1978 or 1979, we would not be here today.

The difficulty is the process, and we are being thwarted by a very small number of people who agree with you that the system works. Most of them feel that when 67 or 68 percent of the dollars in the process here are going for transaction costs, that the injured consumer and the public is not being well served.

But the problem here is not that we did not try or the Carter Administration did not try to get shorter to adopt the uniform product liability law in much the same way that the Commercial Code was adopted. But it turns out that was so organized group of contract lawyers in the way that there is an organized group of trial lawyers. The problem is simply politics. And we simply must deal with this problem before it just cripples us even further.

Thank you, Mr. Chairman.

Mr. McKusick. I assure you, Senator, the political side of this is beyond my ken.

Senator Bryan. That must be a New Englander term, "beyond my ken." I am sure you will add a definition for the record on that. We do understand it.

Thank you very much. You have been very forthright, have been very helpful, and we very much appreciate your attendance here today.

Our last panel will consist of the Honorable Warren W. Eginton, United States District Judge, United States Courthouse, from Bridgeport, Connecticut; Professor James A. Henderson, Jr., the Frank B. Ingersoll Professor of Law, Cornell Law School; Professor Lawrence C. Mann, the Assistant Professor of Law at Wayne State University in Detroit; and Mr. Howard Fark, who is the Vice President of Minster Machine Company in Minster, Ohio.

Gentlemen, we welcome you to the hearing. We appreciate your patience, and we can assure you that you are going to be given the full attention and time that those who spoke on the previous panel or who introduced this subject earlier.

Let us begin with the Honorable Warren W. Eginton. And I do not know, Your Honor, whether I pronounced your name correctly.

Mr. Eginton. That's correct, sir.

Senator Bryan. Good.

STATEMENT OF WARREN W. EGINTON, UNITED STATES DISTRICT JUDGE, BRIDGEPORT, CT

Mr. Eginton. I must say that I congratulate Senator Kasten on surviving seven years better than I have. I came down in the golden age of his chairmanship, and I see his hair is better than mine. He doesn't even have a touch of gray. I could conclude that it is tougher to be a Federal judge than a U.S. Senator, but that would not be a wise conclusion in this setting.

I apologize, Mr. Chairman, for not having submitted the 65 copies. I got a call from Sherman Joyce two weeks ago. I sent him my written remarks immediately, but I did not get your letter until just as I was going out the door of chambers yesterday asking for the 65 copies. So, I called Sherman right away, and I hope something has been done about copies.

I have a one note theme on S. 1400, and that is transaction costs. I tried product liability cases for 20 years, saw the complexities of them because I would be not only defending, but I would be a cross-plaintiff against component suppliers or something like that. They are very complicated cases. They involve many different entities, and they are difficult to prepare and to try and to settle.

They need certainty, and I discovered after I became a judge that that certainty is lacking and that transaction costs are astronomical because of two levels of uncertainty. And let me deal with both of them.

This is not just a question of deciding where you are going to bring the suit. Now, Senator Gorton noted that Washington has no punitive damage statute. So, you are hardly, if you are a plaintiff's trial lawyer, going to want to sue Boeing in its home state. And you do not have to sue Boeing in its home state. You can come into what Senator Hollings called the gold mine of New York City and you can bring your suit against Boeing there.

But that does not end the transaction costs when you are trying to figure out where you are going to bring the suit because the minute you bring the suit someplace, the judge who is trying the suit has to deal with all the arguments as to what law he should apply. He does not have to apply New York law because he is sitting in New York. I do not have to apply Connecticut law because I am sitting in Connecticut. You have to take a look at what happened to the factual situation in the case.

Now, I have a case that I will give to Sherman Joyce that I brought down and will photostat it, the Halstead case which Senator Kasten has heard me talk about before. But the Halstead case really is the sine qua non of a terrible situation on transaction costs.

I had to try that case for two weeks without a jury on the same issues that I was later to submit to the jury, and the reason I had to hear the same evidence for two weeks and get all the briefings on it was to determine what law should be applied. This was one of those aircraft crashes. It occurred in Senator Rockefeller's home State of West Virginia. The plane had taken off from Texas. It was due to land in Connecticut. The people aboard were Connecticut residents. The airport approach map which was alleged to be defective was made by the Jeppeson Company in Colorado.

So, the arguments were about what jurisdictional law to apply, and it made a difference. It made a difference as to punitive damages. It made a difference as to the cap on pain and suffering. It made a difference as to joint and several liability. There were all kinds of things that it made a difference in, attorneys' fees. Therefore, it was important to the parties to try to get, on the one hand, the most beneficial law they could get and on the other hand, the most restrictive law they could get.

So, for two weeks we tried that. Then I wrote a 15 page opinion. I quickly eliminated Texas and one other state, Virginia, because the air traffic control was out of Dulles at Chantilly, Virginia. But we eliminated that. So, we had West Virginia, Colorado and Connecticut, and we finally settled on the law of Colorado in one respect and the law of West Virginia in another.

But my opinion was appealed, an interlocutory appeal to the Court of Appeals of the Second Circuit in New York. They split two to one on whether I had applied the proper law. And they wrote a 10 page opinion. So, we had all told 25 pages in the Federal Reporter dealing with just the conflict of law issues before we could ever get to the merits of the case and try it. So, when you are talking about transaction costs, that is the horrible.

What I see in the state legislatures, because of what Senator Rockefeller alluded to and what Senator Kasten alluded to, is that the pressures on the state legislatures are heavy. We have seen it in Connecticut where we have a product liability law and two tort reform acts. Nobody is happy with them. There is not a single spokesman in our state who is happy with those laws because they have engendered so much litigation to understand what they mean.

And the other drawback is that once the state legislature takes a crack at something and comes out with a product, they are less likely to be willing to go back and revisit it. And that is what we have seen in Connecticut where we have a bad law and nobody is going to revisit it. You people—and Senator Kasten can really testify to that—have the patience for the long course, and it has taken a long course here. And that is what it will take. And the state legislatures cannot do that.

And the person to talk to you about that is Marty Connor with the ATRA, the American Tort Reform Association, because they track what the state legislatures are doing, and they will show you the difference which makes shopping for a forum—not just the initial forum, but then what law you are going to apply—something that causes a tremendous amount of transaction costs.

And that is my one note theme.

[The statement follows:]

STATEMENT PERTAINING TO SENATE BILL NO. S 1400
"PRODUCT LIABILITY REFORM ACT"
SUBMITTED TO
THE COMMITTEE ON COMMERCE, SCIENCE, & TRANSPORTATION
OF THE U.S. SENATE ON THURSDAY, FEBRUARY 22, 1990
BY WARREN W. EGINTON, U.S. DISTRICT JUDGE,
DISTRICT OF CONNECTICUT

I. Professional Background and Qualifications

My name is Warren W. Eginton. On July 24, 1979, I was confirmed by the U.S. Senate to be a District Judge for the District of Connecticut and have been sitting continuously since that date at Bridgeport. My comments respecting Senate Bill No. S. 1400 express my views as an individual. They are not presented in behalf of any organization of judges, and are not intended to reflect the views of any other of my judicial colleagues, either federal or state.

From 1960 through June, 1979, as a partner of the law firm of Cummings & Lockwood in Stamford, Connecticut, I represented clients in major product liability litigation, primarily conducted in federal courts throughout the United States. During those two decades I participated in aircraft accident litigation involving, among others, the crash of a United States Navy blimp, of a United States Army helicopter, and of a private helicopter as well as fixed wing aircraft. Other major product litigation involved incinerators and power plants located throughout the United States, and various categories of durable goods. The highlights of those cases were presented in detail to the Senate Committee on the Judiciary at the time of my confirmation in 1979. I was a founding member of the Product Liability Technical Committee of the American Society for Quality Control, and a member of the Product Liability Committees of the American Bar Association and of the Defense Research Institute. Since my confirmation as a judge, I have restricted my product liability activities to the educational area on matters of judicial concern. In that role, as of 1987, I became the Editor-in-Chief of Garland Law Publishing's periodical, "Products Liability Law Journal", a publication whose purpose is to encourage the "airing of diverse points of view" in the conduct and resolution of product liability litigation.

My experience with product liability legislation, as distinct from litigation, began in 1970 with the issuance of the report of the National Commission on Product Safety chaired by Arnold Elkind, Esq. of New York. That committee included in its recommendations a principal conclusion that consumer legislation presented such a "hodgepodge of tragedy-inspired responses to challenges" that a federal presence was required to exercise "central leadership" with respect to the enactment of appropriate legislation on the state or federal level. Specifically, the commission concluded as early as 1970 that there was "a need for a major federal role" in the development of product liability legislation.

My conduct of product liability seminars during the 1970's included instruction concerning the Consumer Product Safety Act and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. This led to a strong interest in the work of the Federal Interagency Task Force on Product Liability when that group was created in 1976. In Connecticut during the late 1970's

I participated in a group representing all interested factions in the drafting and promulgation of a product liability act for that state. Connecticut enacted the first comprehensive state product liability legislation to be modeled after the Uniform Product Liability Act, (UPLA) effective July 6, 1979. Unfortunately, the drafters of that legislation, including myself, ignored the warning prominently displayed when the interagency task force issued its comment draft in January, 1979. The task force recommended that state adoption await the final version of UPLA. However, the comment draft was the best then available, and so Connecticut adopted many of its major provisions, which were subsequently amended significantly in the final version of UPLA published in October, 1979.

Since 1979, and my role change from litigator to judicial officer, I have concentrated on a limited area of product liability litigation. I consider it proper for a judge to participate in discussions concerning product liability legislation, both state and federal, because of the obvious impact of such legislation on the conduct of a product liability trial. I have published papers on UPLA, on S. 2631, the Product Liability Act introduced in the 97th session of the Congress, on S. 44, the Product Liability Act introduced in the 98th session of the Congress, on S. 100, the Product Liability Act introduced in the 99th session of the Congress, and on H.R. 1115, introduced in the 100th session of the Congress. Those papers were consolidated in my enclosed presentation to the American Bar Association-American Law Institute 1988 seminar on legislative developments in product liability.

II. The Historical Failure of State Legislation

When I met Victor Schwartz at an Atlanta seminar in 1979, there was no one in my experience more enthusiastic and dedicated than this then-chairman of the interagency task force. He spoke frequently and affirmatively in behalf of his comment draft and later in behalf of the final version of UPLA. Little did he or many others envision how difficult would be the task of promoting uniformity among the state legislatures in enacting this bill. The history of the Uniform Sales Act, followed by its successor, the Uniform Commercial Code, and the history of such uniform acts as the Uniform Reciprocal Support Act gave credence to the confidence expressed by Victor Schwartz. Many such acts had been adopted with effective uniformity by legislatures throughout the United States. Such was not to be the history of UPLA. It soon became apparent, as I have noted in an earlier paper attached hereto, that the complexities of drafting legislation that would be satisfactory to a plurality, let alone a majority, of the individuals and entities affected by the product liability explosion would prove insurmountable. At numerous seminars over the past three years I have encountered only a handful of panel members, coming mostly from academia, able to assume a dispassionate, reasonably objective view of the problems and the solutions. For the most part the rhetoric of opposing viewpoints made consensus impossible to achieve. In many instances the goals of some of the participants were too extreme to permit compromise. Surprising to some, the American Bar Association and large segments of the defense and insurance bars joined the strong attack on the legislation mounted by attorneys representing plaintiffs in product liability cases. Segments of the insurance industry were fragmented, as were manufacturers and large and small business entities. There is ample justification for the change of position taken by Victor Schwartz, who now concedes the failure of his legislative efforts to achieve uniformity in the various states, and who strongly favors the adoption of a national product liability act.

My own view, from the judicial standpoint, rests on a bias that uniformity is desirable. This in turn is based upon my years of experience in trying federal cases throughout the United States and finding that the uniformity of the famed Federal Rules of Civil Procedure simplified the burdens of trial and led to economies and reduction in transactional efforts that were significant to me and to the clients I represented. I have had the same experience on the bench with the Federal Rules of Evidence. I conclude that the more that uniformity can be accomplished throughout the states, either by national legislation or by uniform acts, the more quickly the litigation wil flow and the lighter will be the economic burden on all parties involved. Certainly, the task of the judge and of the juries in understanding the problems and the rules of law to be applied to those problems will be greatly simplified by uniformity.

III. Beneficial Features of the Federal Product Liability Legislation

Senate Bill No. S. 1400 sets forth a goal "To regulate interstate commerce by providing for a uniform product liability law...." In many important respects, that goal is accomplished by S. 1400 as now drafted. The purpose of the interstate commerce regulation through this bill is to create uniform standards throughout the 50 states, thereby reducing the burdensome transaction costs experienced in product liability litigation over the past two decades. In the following respects, in my judgment, the bill provides clear and reasonable guidelines enabling parties to potential litigation to identify their rights and obligations, in turn facilitating settlement or providing a degree of certainty to the course of the litigation.

Senate Bill No. S. 1400 is a positive step forward in major areas in which uniformity has been notably lacking to date. In my judgment these areas are embodied in Sections 102 (Uniform Definitions); 103 (Preemption); 302 (Uniform Standards of Liability); 303 (Uniform Standards for Punitive Damages); 304 (Uniform Statutes of Limitations and Repose); and 305 (Worker Compensation Offset).

In al of the foregoing significant areas, it is my judgment that the proposed legislation will establish clarity and uniformity, and will substantially reduce transaction costs, both direct and indirect, associated with product liability litigation to date. I perceive no negative aspects to any of those proposed sections of the bill.

In conclusion, so long as all entities involved are willing to recognize that in certain areas there is probably no legislation that can effect a cure, then I believe that there is a good possibility for more unity than now exists as to the necessity for national product liability legislation such as Senate Bill No. S. 1400 which, on balance, I strongly favor from the viewpoint of a judge who would benefit from uniformity, both in the course of the trial and in the area of settlement before the trial has to commence.

WARREN W. EGINTON

Senator **Bryan**. Thank you very much, Your Honor.

We will now hear from Professor Henderson.

STATEMENT OF JAMES A. HENDERSON, JR., FRANK B. INGERSOLL PROFESSOR OF LAW, CORNELL LAW SCHOOL, ITHACA, NY; ACCOMPANIED BY THEODORE EISENBERG, PROFESSOR OF LAW

Mr. **Henderson**. Thank you, Mr. Chairman.

I am Professor Jim Henderson, and this is Professor Ted Eisenberg at the end of the table. We are on the faculty at the Cornell Law School, which I would note is in up-state New York.

In addition to teaching products liability for 20 years, I have also written a number of articles on the subject and several books. I brought a copy of one of them on the subject of products liability, together with a 1989 supplement, which I would like to make available to the staff as kind of a reference work.

Ten years ago I came down to Washington to testify before committees of both the House and Senate in support of several proposals for Federal products liability reform. So, I have been to these wars over the years. It seemed to me then that state courts were running amuck, were out of control, were competing with each other to make products liability more and more, from the defendant's point of view, disastrous.

In the intervening 10 years, I have continued to work in products, as I said, and I now believe that the circumstances have changed in at least one important way. Indeed, the subtitle of my brief remarks today could be "A Funny Thing Happened on the Way to These Hearings." The funny and I hope interesting thing to which I refer is an important shift in the direction of judicial decision making on the part of American judges, both state and Federal, in favor of defendants in products liability actions.

Three years ago I decided to write a treatise on the subject of products liability, a multi-volume work. I began reading recent court decisions published in state and Federal courts. A year ago, while I was reading the decisions for the year 1988, I sensed intuitively a shift in the defendant's favor, the first time a rather marked shift. I tested it against 2,500 cases that I had collected and parsed in my data base for the years 1979 through 1988, and I found a distinct pro-defendant trend I confess it surprised me a little bit.

I took my findings to my colleague, Ted Eisenberg, who has an extensive background in testing the data in the Federal district courts, mostly in civil rights actions in his own work. We collaborated. He ran parallel tests against tens of thousands of decisions collected in all Federal district courts over approximately the same time period tracked by my analysis.

Well, he confirmed that a trend is under way favoring defendants. This is a trend in judicial decision making, and it is in the state and the Federal courts sitting in diversity. We report our findings in a recent issue of the UCLA Law Review, and we appended it to our written statement for your files.

The chart on the easel that you can see over here—probably the audience cannot, but the chart over here captures our principal findings graphically. We reproduced two curves. The piece in

UCLA had several more. And for those behind me, it is simply two curves descending from left to right in a rather, I think, significant slope.

The upper curve represents the published opinion data that I gathered. In 1979, 55 percent of the decisions I canvassed favored plaintiffs and in 1988 it was down to 37 percent.

The lower curve represents the district court data that Ted Eisenberg tracked. It was 40 percent favoring plaintiffs (we call it a plaintiff's success rate) in 1979, down to 32 percent in 1988.

The curves track one another rather remarkably and they are statistically significant.

Assuming for purposes of argument that we have shown the existence of a pro-defendant trend in these years, what are the implications for a Federal products liability reform proposal?

One implication that, as an old war horse, I cannot avoid making or observing is that the need for sweeping reform at the Federal level has been reduced. I do not know any way around that conclusion. I came down here 10 years ago in favor of what I would call significant intrusion into state law, and our recent findings have unsettled me. I did not set out to prove anything, but we tested the data, and there it is.

Now, on the other hand, I think that there are some changes that legislatures can make more readily than courts can. And I also recognize that there are some changes that the Congress can make more meaningfully and tellingly than could state legislatures?

So, if someone were to ask me—and Ted can speak for himself in the questions—should the Congress get involved in products liability reform, given the existence of the pro-defendant trend we have identified in judicial decision making, I would be inclined to ask what sort of reform. Where does the Congress have a comparative advantage over state courts and state legislatures.

Thank you.

[The statement and questions and answers follow:]

STATEMENT OF PROFESSORS JAMES A. HENDERSON, JR. AND THEODORE EISENBERG, CORNELL LAW SCHOOL

We are professors at Cornell Law School. Professor Henderson has been teaching products liability for twenty years. Professor Eisenberg has been engaged in empirical studies of the legal system for the past eight years. Resumes containing detailed information about our backgrounds are attached to this testimony. We appear at the request of the Committee's staff to report findings based on our study of products liability cases. This testimony is based on our published findings, which appear in the *UCLA Law Review* and are attached hereto.

Briefly summarized, we find, in the early to mid-1980s, a significant turn in judicial decisionmaking away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs' rights to recover in tort for product-related injuries. This trend is evident in an increasing percentage of decisions, both routine and ground-breaking, favoring defendants. At the trial court level plaintiffs' likelihood of success in products cases has been steadily decreasing.

Judicial opinions in recent products cases depart from prior trends in two important ways. First, several cases represent, whatever other face the opinions put on the decisions, outright retreats from prior pro-plaintiff stances. Courts effectively are taking away what they previously have given or, in matters of first impression within a jurisdiction, are refusing to follow the lead of courts that had earlier adopted a rule benefiting plaintiffs. Second, in an area that developed for plaintiffs as rapidly as did products liability, refusals to extend doctrine signify the temper of the times almost as much as do withdrawals from earlier holdings. Courts now exhibit a novel reluctance to expand established products doctrine to benefit plaintiffs. A substantial anecdotal review of the case law supporting these statements appears in Part I of the attached UCLA article.

Anecdotal study of individual opinions does not necessarily prove that a broad-based change in judicial attitudes toward products liability has occurred. Our assertion of a pro-defendant trend is based on studies of two sets of data. The first consists of nearly all products liability published opinions, state and federal, issued from 1983 to 1988. To this we added a sample of opinions published in 1979 and 1981. The second data set consists of all federal district court products liability cases resolved from 1979 to 1987. Although most tort litigation occurs in state courts, federal courts apply state law in most tort cases. One therefore expects trends in federal court tort litigation generally to parallel those in state courts. Moreover, compared with tort cases generally, federal court products filings comprise a surprisingly high fraction of all products filings. We estimate that somewhere between 25 percent and 50 percent of all products case filings are in federal court. Clearly, plaintiffs file enough federal products cases to yield meaningful results. Both the products liability published opinions and the federal district court cases reflect a substantial pro-defendant trend.

I. The Pro-Defendant Trend Reflected in the Bulk of Published Opinions

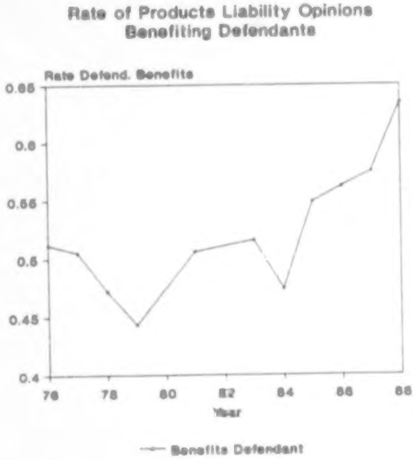
A. Party Benefiting From Decision

Our initial inquiry into the published opinion data asks how products liability plaintiffs and defendants fared in each year, reflected in what could be described as the "bottom line" assessment regarding every case that could be said to make law: "Whom does this decision benefit?" The two responses relevant to our inquiry – "plaintiffs" and "defendants" – are expressed in the plural, not the singular.

Thus, the data reflect the likely effects of any decision on plaintiffs and defendants generally, as classes of participants, rather than the effects of the decision on the individual parties in the particular case. Of course, in many cases the group (plaintiffs or defendants) that benefited from the decision will match the winner or loser in the particular case. But that need not be the case. And if a decision is so dependent on factors unique to it that it creates no law valuable to other litigants, it is not included in the sample. Because we are more interested in the precedential effects of opinions on the path of the law than on their resolution of particular cases, we pursue the group-oriented inquiry rather than the inquiry focused on individual litigants.

Figure 1 presents the results, after eliminating opinions in which the bottom-line benefits are ambiguous. The results are consistent with the hypothesis that courts have increasingly been favoring products liability defendants in recent years. In 1979 defendants as a group benefited in 43 of 97 (44.3 percent) cases with ascertainable bottom-line benefits. By 1988 this figure had risen significantly to 63.4 percent (180 of 284) cases. The march during the period 1983-1988 towards increased defendant success over time is unrelenting, with only one year breaking the trend of decreasing plaintiff success. Both the size of the changes and their trend from 1983-1988 are unlikely to have happened by chance.

One limitation of the published opinion data, and therefore of our results, is that our data for 1979 and 1981 relied on different methodology than our post-1982 data. Even if we ignore pre-1983 data, however, the post-1982 data show a surprisingly uniform trend. We also are comfortable making the assumptions necessary to regard Figure 1 as evidence of a decade-long trend, even ignoring our published opinion data from 1979-1981. Pre-1983 attitudes towards products cases simply did not entertain the notion of the law shifting to favor defendants. The anecdotal data noted above support the assumption that pre-1983 law was more favorable to plaintiffs than post-1983 law is shown to be. And the trial court data discussed below, drawn from federal district court decisions and going back to 1979, support the assumption that prior to 1983 plaintiffs were doing relatively better, and



Missing: 1980, 1982

Figure 1

defendants relatively worse, than they have done in the last several years. Put differently, if detailed study of pre-1983 data were to reveal that plaintiffs were not doing relatively better than in the post-1983 period, that would be even more surprising than the pre-1983 trends reported here.

One explanation of the data that might undermine the Figure 1 trend can be eliminated. The trend in appellate decisionmaking may be driven by the products liability reform statutes recently enacted in many states. Our concern is not with what might be called indirect effects – for example, if the enactment of such statutes changes judges' attitudes generally, and those attitudinal changes affect their decisionmaking, so be it. Instead, our concern is with direct effects – when a statute requires the reversal of judicial precedent regardless of whether the judges applying the statute agree with that reversal in principle. Because ours is a study of changing trends in judicial rather than legislative decisionmaking, the direct effects of reform statutes should be controlled for. To eliminate any possibility that direct effects of reform statutes influence the results, we reanalyzed the data for the years 1983-1988, while culling all decisions that in any way involved special products liability or tort reform statutes. We did not try to second-guess whether the statute actually affected the outcome in any given case. If a decision in any way involved a recent products or tort reform statute, out it came. Eliminating cases involving statutes removed neither the trend nor the significance of the results.

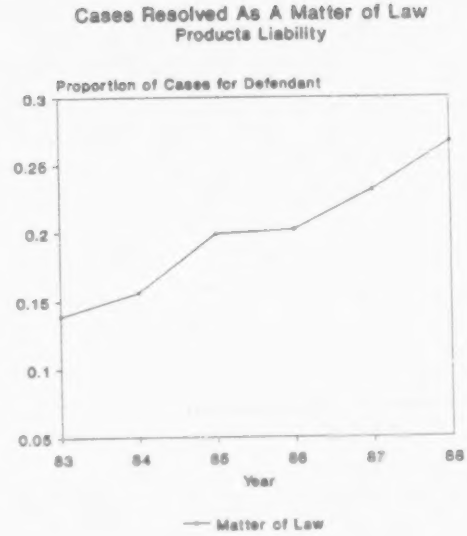
Taking into account the several other possible sources of the pro-defendant trend, it is difficult to explain the trend by anything other than a decline in judicial receptivity towards products cases. This trend is unlikely to have happened by chance. It is not a function of increased plaintiff appeals. It is not, at least directly, a function of recently enacted statutes. It is unlikely to be a function of the same trend in other areas of law.

B. Victory As A Matter of Law

We next ask the extent to which, in each of the six years for which we have detailed published opinion data, courts decided products liability claims for one side or the other as a matter of law. The hypothesis of increasing defendant success predicts judges becoming increasingly willing to resolve products liability claims in favor of defendants as a matter of law. Because products claims are so infrequently resolved in plaintiffs' favor as a matter of law (no more than three cases in any year), an increase in the percentage of cases resolved as a matter of law is a pro-defendant trend. The results of this inquiry are shown in Figure 2.

The Figure 2 results support our hypothesis. As Figure 1 suggests, not only did published decisions benefit defendants more frequently over time, they increasingly benefited defendants by refusing to allow plaintiffs to reach the triers of fact. In 1983, 13.9 percent (50 of 361) of published products opinions in our data base found for defendants as a matter of law. By 1988 this rate had nearly doubled to 26.7 percent (98 of 367 decisions). This significant trend never wavered across the six-year period, with increased defendant success as a matter of law in each year. Some of these dismissals, of course, may have been required by new reform statutes noted earlier in connection with the increasing rate at which decisions benefited defendants. We therefore controlled for this possibility and found no significant change in the results.

II. The Pro-Defendant Trend in the District Courts



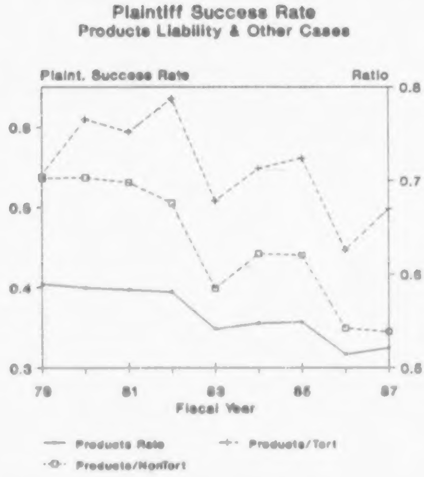
Published Opinions

Figure 2

Three tests using trial court data confirm that we are in the midst of a pivotal era in products liability. During the early to mid-1980s the rate at which products plaintiffs obtained judgments substantially declined. The decline was accompanied by, and appears to have resulted from, an increase in the rate at which products defendants prevailed on pretrial motion. As the published opinion evidence suggests, trial courts have begun applying increasingly stringent legal standards to products claims. Moreover, the pro-defendant judgment and motion trends are not all explainable as part of a general trend applicable to all tort litigation or to all non-tort private civil litigation. Thus, to a significant degree, the pro-defendant trend appears to be unique to products liability litigation. To further test whether the court-made changes in products liability law have affected trial court performance we explore products filing rates, which we predict would decline in the face of an increasingly discernable trend in the direction of defendants winning on motion. The data show a leveling and eventual decline of federal products filings.

A. Plaintiffs' Declining Success Rates

Figure 3 plots the overall success rate for plaintiffs in all products liability cases in which judgment was entered for plaintiff or defendant. These include cases resolved by motion, at jury, at court trial, and by settlement. To limit the analysis to cases pursued seriously in court and not quickly settled, we include only cases in which a responsive pleading was filed and some court action occurred. But the results do not depend on this limitation. The line labeled "Products Rate" in Figure 3 (which uses the figure's left-hand vertical axis) shows the overall judgment rate for plaintiffs for each of the years 1979-1987. It shows, for example, that in 1979 plaintiffs prevailed in 40.5 percent of products cases showing definitive judgments and that in 1987 plaintiffs prevailed in only 32.5 percent of such cases. Plaintiffs' success rate declined by eight percent, about 20 percent of the earlier success rate. The Figure suggests a clear and significant decline in plaintiff fortunes during the period, with the decline confirming the published opinion finding of increasing defendant success from 1983 on. Furthermore, the decline's greatest step down occurs in 1983, just when the published opinions suggest clear doctrinal reformation. The plaintiff judgment rate held steady at around 40 percent through 1983. Beginning in 1983, plaintiffs' judgment rate fell to around 35 percent from 1983 to 1985 and to around 32 percent in 1986 and 1987. The decline at the district court level corresponds to the declining fortunes suggested by the published opinions.



Issue joined, cases reaching judgment

Figure 3

Many possible explanations for the decline are available. Plaintiffs, emboldened by years of relative success in products litigation, may have begun filing marginal cases. These cases lose more often than before not because of a shift in legal standard but because they constitute a weaker class of filings. Similarly, defendants, singed by the 1960s and 1970s expansions in products liability, may have modified their underlying behavior regarding product safety so that there are fewer meritorious products cases to bring. We have no definitive test by which to prove or disprove these explanations based on the trial court data. Indeed, it is unlikely that the data needed to connect progress in product safety and products liability law exist. Although products liability's growth undoubtedly has increased corporate safety consciousness, the available studies cast doubt on the notion that safety behavior has changed dramatically in response to burgeoning products liability claims. And the rhetoric of the published opinions, measured both qualitatively and quantitatively, strongly suggests that these are not the primary explanations. The courts seem quite clearly to be saying that products liability has gone far enough; it is time to turn things around. The combination of published opinions self-consciously designed to assist products defendants, accompanied by a decline in plaintiff success rates, is powerful evidence of a changing legal climate.

One important possible explanation for the decline in products success rates does not depend on plaintiffs filing less meritorious cases or on changes in underlying behavior. The success rate of plaintiffs in all civil cases may have declined during the 1980s. It is a common shortcoming of studies of litigation trends to fail to supply a baseline against which to measure trends in the class of cases being observed. Products liability plaintiffs, rather than suffering an unusual fate, may have been swept up in a larger pro-defendant trend. Under this view, if we are in the midst of a revolution it is not a products liability revolution.

This explanation can be tested using the Administrative Office district court data. Figure 3 contains data on two other classes of cases, designed to serve as controls on the analysis of products liability cases. The two groups of control cases are: (1) other (non-products) tort litigation and (2) all non-tort private federal civil litigation. The line labeled "Products/NonTort" in Figure 3 (the line uses the right-hand vertical scale) shows the ratio of success rates for products cases and all private non-tort civil litigation terminated in federal district court. The ratio is computed by dividing the products success rate for a given year by the success rate in private non-tort cases for that year. The negative slope of this line shows a substantial and significant decline in products plaintiffs' success rate vs. success rates in other litigation.

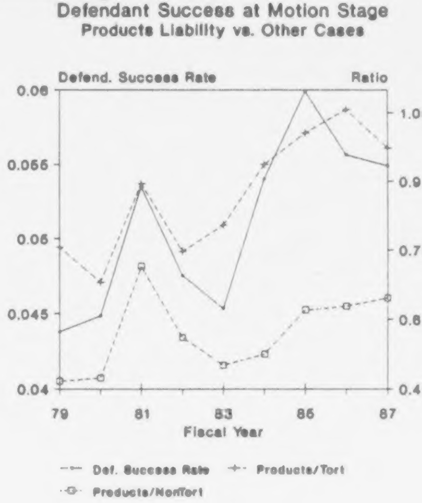
The line labeled "Products/Tort" in Figure 3 shows the ratio of success rates for products cases and non-products tort litigation terminated in federal district court. This ratio is computed by dividing the products success rate for a given year by the success rate in other tort cases for that year. Other tort litigation, like products litigation, suffered a decline in success rates. But the ratio line in the figure shows that, since the early 1980s, the products success rate declined significantly faster than the success rate in other tort cases. The decline in plaintiffs' success in products cases cannot be explained as merely part of a more general trend that affects all civil litigation or other tort litigation. Some but by no means all of the products decline can be viewed as part of a similar trend in all of tort litigation.

B. Source of the Decline: Defendant's Pretrial Motion Success

The pro-defendant trend suggested by published opinions forecasts a specific source of much of plaintiffs' declining success in the district courts. The trend reflected in our data is not simply one of juries rebelling against the perceived excesses of the products liability system. The change we hypothesize consists largely of courts articulating new law; it is a revolution primarily of lawmaking, not fact-finding. To the extent the revolution is one of new legal standards, we would expect an increase in the rate at which district courts, applying the new, more pro-defendant legal standards, dispose of products cases before reaching trial. Thus, as suggested by the published opinion data, the revolution we detect forecasts not simply a decline in plaintiffs' success rate, but also an increase in defendants' rate of success at the pretrial motion stage.

Figure 4 shows the rate at which defendants prevail on pretrial motion in products cases in which issue is joined. The "Defendant Success Rate" line (which uses the left-hand vertical scale) shows that in 1979 products defendants prevailed at the motion stage in 4.4 percent of cases in which issue had been joined. By 1987 this rate increased to 5.5 percent. From 1979 to 1983 the motion rate was relatively stable at around four percent. In 1984, in the midst of the published opinion trend, it jumped and has remained in the 5.5 percent range. A simple model in which one describes the defendant success rate on motion by the time elapsed since 1979 shows the upward trend to be statistically significant.

Is this increase in defendant success rate part of a larger trend in tort cases generally towards increased defendant victories at the pretrial motion stage? To study this, the line labeled "Products/Tort" (which uses the right-hand scale) in Figure 4 plots the ratio of defendant win rates for products and tort litigation. It shows that in 1979 products defendants won by pretrial motion .76 times for every time other tort defendants won by pretrial motion. By 1987 this ratio had risen to .97; products defendants were winning by pretrial motion about as often as other tort defendants. The major shift occurred in 1984. Using non-tort private litigation as a reference group yields a similar story. The line labeled "Products/NonTort" in Figure 4 shows that in 1979 products defendants won by pretrial motion .47 times for every time non-tort private defendants won by pretrial motion, a figure that held roughly through 1983. By 1987 this ratio had risen to .65. Products defendants' increased success at the pretrial motion stage is not simply part of a larger trend in other tort or other private non-tort litigation.



Cases in which issue joined

Figure 4

To what extent does the decline in overall plaintiff success rates portrayed in Figure 3 correspond to the increase in defendant motion rate success portrayed in Figure 4? The overall success rate can be viewed as a combination of success rates at various stages of litigation. It is a function of success rates in jury trials, court trials, at settlement, and on pretrial motion. As expected, each of these success rates significantly correlates with the overall success rate. Yet of all the success rates influencing the overall success rate, the defendant's success rate at the pretrial motion stage is by far the biggest factor in describing the decline in plaintiffs' overall success rate. This is true despite the fact that tried cases with known judgments substantially outnumber cases in which the defendant wins by pretrial motion. The variability in the defendant's win rate on motion best explains the variability in overall success rate. Consistent with the results reached earlier in connection with the published opinion data, the pro-defendant trend in the district courts has occurred primarily at the motion stage.

C. Doctrinal Change Affecting Filings

If there has been a pro-defendant shift in products liability law, plaintiffs should at some point recognize this and reduce products filings. In testing the effects of doctrinal change on general products filings, however, one ought to take account of filing rates in other civil litigation and the fact that, as more products become available, opportunities for products claims are bound to increase. Given the growth in products and population, we would not be surprised to see products filings continue to increase each year through the current decade, although we would expect to see the rate of increase decline in light of the unfavorable legal climate for products plaintiffs.

In fact, the data support our hypothesis more strongly than we have any right to expect. As we would have predicted, from 1976 to 1981, products filings increased at a rate well ahead of the increase in civil filings and the increase in the number of products. From 1981 to 1986, however, federal products liability filings increased at about the same rate as civil filings in general and personal expenditures on goods (a measure of the available products). Since 1986, federal products filings have plummeted. In 1987 federal nonasbestos products filings declined by about nine percent when overall federal filings were down only about six percent. Federal nonasbestos products filings declined a further seventeen percent in 1988, while total federal filings were down less than one percent. And in 1989, nonasbestos products filings declined by about five percent while total federal filings shrank by less than three percent. Since 1986, nonasbestos filings have declined by twenty-six percent while all federal filings have declined by only about eight percent. This levelling and decline in products filings is consistent with the published opinion trends described in Part I.

HENDERSON'S ('59) RESPONSES TO ROCKEFELLER'S QUESTIONS

April 4, 1990

Q1. In the first part of your article entitled, "The Quiet Revolution in Products Liability", you cite certain appellate cases to show that some appellate courts are beginning to accept arguments put forth by defendants. Do you think that for some of the cases that you cite, we could find a case issued from another state's court with a completely different holding from the decision that you cited in your article?

A1. Yes, I agree. See Henderson & Eisenberg, Quiet Revolution at 488, n.47.

(Follow-up Q) Is it fair to say, Professor, that just because a particular state court's decisions have become more pro-defendant or more pro-plaintiff, it will probably not lead to increasing the uniformity of decisions or predictability in the 55 different courts of the states and territories?

(Follow-up A) I would agree, if we replaced "probably" with "necessarily."

Q2. In your article, you use the date you have collected to show that in the mid-80s judges started to refuse to expand product liability doctrines. In other words, aren't you saying that the courts altered the direction they were taking in products liability cases. And if that is true, where the courts have moved in one direction, isn't it possible (even likely) that they could swing another way (be it pro-plaintiff or pro-defendant) in the future? What does this do for uniformity and predictability?

A2. In an early draft of the article, I suggested that our tort system cycles back and forth between expansionary and contractionary directions. Eisenberg urged me to delete the suggestion, because our data do not support it. But I believe, intuitively, in the "cyclical" hypothesis.

Q3. In 1983, you write an article in the Hofstra Law Review called "Why Creative Judging Won't Save the Products Liability System". In that article you said there are limits on what judges can do and that legislative reforms were needed. Are there any thoughts contained in that article that you would subscribe to today or do you believe now that creative judging will save the products liability system?

A3. I still believe that judges in many states--e.g., Pennsylvania--need legislative help on the design issue.

Q4. Professor, could you support a limited Federal product liability law that would address some of the major problems affected interstate commerce such as punitive damages and joint and several liability?

A4. Yes.

Q5. Don't you agree professor that some of the provisions of S. 1400 cannot be accomplished by the courts? For example, do you think a court by itself would create a rule like the California rule of joint and several liability? Or the products sellers provision in S. 1400?

A5. Yes. Probably not.

Q6. In a casebook that you authored with Professor Twerski, you stated at page 299 that, "Manufacturers clearly need articulated standards that set forth the kind of aggravated conduct for which courts will impose punitive damages." Do you still subscribe to that statement? If you do, do you think that that goal will be brought about more easily by state action or by a uniform federal products liability statute?

A6. Yes. Hard to know.

Q7. On page 299 of your casebook, you state, "the imposition of a standard higher than the preponderance of the evidence standard provides the trial judge with a mechanism for rejecting punitive damages with the plaintiff has failed to demonstrate that clearly egregious conduct caused the design error or a failure to warn. The key is provide the trial judge with a screening mechanism to exclude punitive damages from the run of the mill products cases." And you go on to state that a higher burden of proof--such as a "clear and convincing evidentiary standard"--would help accomplish this goal. Are you aware that such a standard is contained in my bill and would you support it?

A7. My co-author, Professor Twerski, puts greater faith in the "clear and convincing evidence" standard than do I. But I would support the proposition, in the hopes that it might help.

Cornell University
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Myron Taylor Hall
Ithaca, New York 14853-4901

April 10, 1990

Consumer Subcommittee
Committee on Commerce, Science, and
Transportation
Room 227 Hart Senate Office Building
United States Senate
Washington, DC 20510

Hearings on S. 1400: Written Questions Posed by Senator Rockefeller

Dear Senator Bryan:

Thank you for sending me a copy of Senator Rockefeller's written questions about the testimony delivered by Professor Henderson and me. Some of the questions obviously are directed to Professor Henderson and call for his analysis in light of prior statements by him. I will therefore limit my responses to two of Senator Rockefeller's questions that do not depend on prior work by Professor Henderson. I should add that Professor Henderson and I have not had a chance to discuss this response and our views may differ.

Question 1. In the first part of your article entitled, "The Quiet Revolution in Products Liability", you cite certain appellate cases to show that some appellate courts are beginning to accept argument put forth by defendants. Do you think that for some of the cases that you cited, we could find a case issued from another state's court with a completely different holding from the decision that you cited in your article?

(Follow-up) Is it fair to say, Professor, that just because a particular state court's decisions have become more pro-defendant or more pro-plaintiff, it will probably not lead to increasing uniformity of decisions or predictability in the 55 different courts of the states and territories?

Response to Question 1. Yes, for some of the cases cited one could find a case with a different holding from another court. The article addressed the overall trend in the law, not the specifics of each decision in each jurisdiction. One cannot find anything like an equal number of important cases going in favor of plaintiffs.

Response to Follow-up to Question 1. By definition, the possible variations among the states' tort doctrines can lead to less uniformity than would a single federal standard. The virtues of uniformity, of course, can be achieved by a bill increasing the liability of defendants for harms caused by their products as well as by a bill reducing that liability.

At the hearings I attended, the case for reducing defendant liability seemed rather weak. It depended in large part on a survey of CEOs in which they were asked whether products liability was a problem for their companies. The flaws in such a survey are so substantial and obvious that no self-respecting legislature should act on the basis of its results. Based on what I heard, I see no basis for preferring a uniform rule curtailing products liability over a uniform rule expanding it. But I have not been privy to all of the material in all of the hearings on S. 1400.

Uniformity in the law is an important value that should be implemented by Congress when a strong federal interest is at stake and the benefits of experimentation and variation among the states are outweighed by that federal interest. There are areas of law where these conditions hold. Civil rights laws, federal tax laws, labor laws, and other laws embody both strong federal commitments and understandable reluctance to let the states go in different directions. But tort law traditionally has not been such an area. The principal reason for congressional interest in this subject seems to have been the cries for the past decade that plaintiffs were faring too well. Now that doubt has been cast on that argument, the rationale has shifted to uniformity and predictability.

I am skeptical about these new rationales. The changing nature of products liability law make me cautious about wishing for Congress to implement a single rule. For the rule Congress adopts had better be a good one since it may preempt further experimentation and change by the states. I see no basis for believing that the rules embodied in S. 1400 are superior to the collection of rules embodied in various state laws and to the ability of the states to adopt the best rules of their sister states, as those rules evolve over time. The one thing we do know is that state products law does change. I worry that Congress may freeze the law with the wrong set of rules at a time when there is no clear reason to act.

Predictability may be furthered by S. 1400. But for a period of time, at least, predictability may be reduced rather than increased. Each state will have to decide the scope of S. 1400's preemption and its relation to state tort law. The interaction between state and federal law in tort will be made more rather than less complex. And given the many issues covered by S. 1400, uniformity will not be quickly, if ever, achieved. The Supreme Court cannot be expected to hear more than one or two products cases a year.

Thus, we are at risk of having not just 55 jurisdictions but an additional dozen federal courts of appeals making products law. At least before S. 1400 the courts of appeals should have felt bound by state law. Until the Supreme Court speaks, it is not clear that state supreme courts would or should be bound by federal interpretations of S. 1400 as it interacts with the relevant state law.

S.1400 also raises the possibility that businesses in a single jurisdiction will be subject to conflicting interpretations of the combination of state law and S. 1400. This possibility of conflicting guidance within a single jurisdiction does not exist now. Since products law is currently a creature of state law, the federal courts are supposed to adhere to a state's highest court's interpretations of substantive products law issues. With respect to matters of federal law, such as those embodied in S. 1400, there is no clear norm that federal courts should defer to state court interpretations or that state courts must defer to lower federal court interpretations. Until the Supreme Court addresses each issue, businesses could be subject to conflicting guidance in a single jurisdiction.

Question 4. Professor, could you support a limited Federal product liability law that would address some of the major problems affecting interstate commerce such as punitive damages and joint and several liability?

Response to Question 4.[1] This question embodies the widespread assumption that punitive damages are a serious problem for the products liability system. Punitive damages often are singled out as a problem and reform proposals often include provisions for abolishing or limiting such awards.[2] Reform proponents claim that punitive damages are routinely awarded in unseemly amounts. Sales and Coles state that " . . . the amount of punitive damages awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind."[3] A policymaker whose impressions of the legal system are shaped by news reports or the pleadings of genuinely concerned special interest groups might well have reason to fear punitive damages in the legal system.

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[1] The discussion of punitive damages that follows is based on my testimony before the House of Representatives on the proposed Civil Rights Act of 1990.

Yet, as is often the case, the impressions created by anecdotes and headlines do not reflect underlying reality. **Every serious study of punitive damages finds them to be infrequently awarded (in a very small percentage of filed cases), to be related to the size of compensatory damage awards, and to correspond to the level of the defendant's wrongdoing.**

A. Frequency of Punitive Damages Awards

There is a widespread perception that punitive damages are awarded frequently and in great amounts. Yet every serious study of the area finds that punitive damages awards are relatively infrequent, that they usually are commensurate with the defendant's wrongdoing, and that they bear a substantial relationship to the size of the compensatory awards.

Rate of Punitive Damage Awards in Tried Cases. Daniels and Martin surveyed punitive damages awards in cases tried to juries in 42 counties in ten states during the early 1980s.[4] In 27 of the 42 counties juries awarded punitive damages in less than five percent of tried cases. In 11 of the other counties, juries awarded punitive damages in five to ten percent of tried cases. In four counties (three in Missouri), juries awarded punitive damages in between 10 and 15 percent of tried cases.

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[2] Nutter, The Fight for Civil Justice Reform, 1984 Insurance Review 2 November/December; 1984 Journal of American Insurance, Unclogging the American Civil Justice System 20; U.S. Department of Justice, Report on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability (1986).

[3] Sales & Coles, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 117 (1984).

[4] Daniels & Martin, Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards (1987).

A Rand study states, "Despite recent increases, punitive awards in general remain infrequent, particularly for product liability and other personal injury suits. Punitive damages were awarded in only eight product liability suits in [San Francisco and Cook County, Illinois] over the 25-year period."[5] In San Francisco and Cook County punitive damages are most likely to be awarded in intentional and contract/business tort cases. "In personal injury cases based on negligence or strict liability, few juries awarded punitive damages. Under 1 percent of such trials produced punitive awards in Cook County; in San Francisco, punitive awards were made in between 1 and 3 percent of trials involving claims of injury on property, product liability, and common carrier."

The GAO Report on products liability cases in the mid-1980s in five states included Missouri, the state the Daniels and Martin study suggests has the highest rate of punitive damages awards in jury cases. Of the 305 cases in the GAO study, 108 were tried in Missouri. Despite this possible distortion in the GAO data, plaintiffs received punitive damages in only 23 of the 305 jury cases, about seven percent.

Rate of Punitive Damage Awards in Filed Cases. The Daniels and Martin, Rand, and GAO figures on the frequency of punitive damages awards all use total jury trials as a baseline. If one shifts the baseline to filed cases, the rate of punitive damages awards in the legal system shrinks substantially. The number of filed cases that are resolved by trial varies by subject area and jurisdiction. For present purposes, a conservative order-of-magnitude estimate for the rates of trial for the whole civil legal system is ten percent. (The actual figure for federal civil litigation is, in recent years, closer to five percent.[6]) Using this simplified aggregate trial rate, we know that about one case in ten reaches trial and, of those that reach trial a high estimate is that ten percent result in punitive damage awards. Combining these rates, punitive damages are awarded in not more than one percent of filed cases, and in most jurisdictions for most kinds of cases, the figure is considerably smaller.

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[5] Mark A. Peterson, Punitive Damages: Preliminary Empirical Findings p. 16 (August 1985).

[6] See Henderson & Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change 546 (1990) (Table A-3).

None of this is to deny that punitive damage awards, however infrequent, have a real effect on the parties' negotiations and settlement discussions. And there are undoubtedly different ways of looking at the data that suggest a somewhat more troublesome picture. Nevertheless, on balance, existing experience with the frequency of punitive damage awards offers little reason for congressional action.

B. Size of Punitive Damages Awards

The Daniels and Martin report on 42 counties found wide variation in median punitive damage awards. They range from a low of $5,570 in Johnson County, Kansas, to highs of about $100,000 in Los Angeles and Sacramento counties, California. Except for four California counties, New York County, and Clay County, all of the median punitive damage awards were below $30,000.

In its study of products liability cases in five states, the GAO found that the size of punitive damage awards was highly correlated with the size of compensatory damages. "Excluding one extreme case in which compensatory damages far exceeded punitive damages, these punitive damages had a correlation of .71 with compensatory damages."[7] "Large punitive awards that were disproportionate to compensatory damages occurred in only a few cases."[8]

Rand's study of Cook County, Illinois and San Francisco jury trials also shows a strong correlation between the size of compensatory awards and the size of punitive damage awards.[9] This relationship holds whether one examines punitive awards against individual defendants or punitive awards against business defendants.

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[7] United States General Accounting Office, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, House of Representatives, Product Liability: Verdicts and Case Resolution in Five States p. 27 (September 1989) [hereinafter GAO].

[8] Id. at 31.

[9] Peterson, supra, at 36-44.

C. Post-Trial Correction of Excessive Awards

Some of the data on punitive damage awards emphasizes mean awards, and therefore may understate the impact of occasional (and headline-making) large awards. Studies do find a few cases in which punitive damage awards are large in comparison with compensatory damage awards.[10] When the damages system does go awry at trial, trial courts and appellate courts almost always provide relief. With respect to punitive damages, the GAO states:

> Tort reform advocates contend that many punitive damage awards are unjustified. Our review showed, however, that the judicial reviews currently built into the tort system eliminate many punitive damage awards. In the cases studied, appellate courts reversed or sent back for further action at the trial court level all 12 of the punitive damage awards on which they ruled.[11]

GAO continues:

> As with unjustified punitive damage awards, the present system already includes controls on the amounts plaintiffs ultimately recover. For extreme awards in the cases we studied, appellate processes and post-trial settlement negotiations, when used, reduced those awards. These mechanisms resulted in large reductions in cases of the most concern to insurers--verdicts of $1 million or more, especially those with large punitive damage awards.[12]

Rand's study of punitive damages in Cook County and San Francisco echoes this theme.

> Post-trial action reduced the award in almost half of the trials that had been fully concluded. . . . The final payment in cases where the verdict was reduced was, on average, 45 percent of the original verdict.
>
> Across all closed cases, both those that had been reduced after trial and those where the original

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[10] GAO, supra, at 71.

[11] Id. at 69.

[12] Id. at 71.

judgment was satisfied, the final award was 50 percent of the original verdict.[13]

Reductions of the kind described in the GAO and Rand research are an important, but probably underreported, feature of the legal system. News reports understandably tend to emphasize multi-million dollar awards. They tend to give less attention to post-trial or appellate reductions of those awards. Like arrests and charges of ethics violations, large monetary awards make headlines and stick in the public mind; acquittals, dropping of charges, and reduction of awards often do not.

The only contrary evidence I have seen consists of anecdotal evidence of occasional strikingly large awards. The substantial evidence that punitive damages in tort law are not sufficiently troublesome to warrant congressional attention has been marshalled by parties without direct financial interests either pro or contra S. 1400. Without more tangible evidence that punitive damages are a serious problem, I do not think federal legislation addressing this matter is appropriate.

With respect to joint and several liability, there have been articles arguing that such liability is inefficient. I would, however, call your attention to a recent article in the Yale Law Journal by Professors Revesz and Kornhauser of NYU Law School. This article casts doubt on the notion that joint and several liability is per se inefficient.

Thank you for the opportunity to respond to these questions.

Sincerely yours,

Theodore Eisenberg
Professor of Law

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[13] Peterson, supra, at 14.

Senator **Bryan**. Thank you very much, Professor Henderson. We appreciate your testimony.

We will hear next from Professor Mann.

STATEMENT OF LAWRENCE C. MANN, ASSISTANT PROFESSOR OF LAW, WAYNE STATE UNIVERSITY, COLLEGE OF LAW, DETROIT, MICHIGAN

Mr. **Mann**. Thank you, Mr. Chairman.

I am Lawrence Mann. I am with the Wayne State law faculty, and I teach products liability. I also in the recent past, at least for the last 18 to 20 months, have served as Governor James Blanchard's special counselor on products liability. We are in the midst of a fact-finding and legislative process in the State of Michigan.

What I would like to do today is to basically recite a few written words and then comment or react to some of the things that I have heard because in addition to rendering a report to the governor, which is attached to my statement,[1] I have also had a chance or opportunity to lecture in Europe and spent some time teaching there, and I have also authored a manuscript on the EEC directive on products liability.

I must first say at the outset that I may be characterized as a reluctant supporter of national law on products liability, but I would have to agree with Jim. It depends on what the substance is because I see no need for a global kind of approach in this area.

With that, I have functioned, as I stated, as the governor's special counselor. In that capacity I have rendered findings of fact and made specific suggestions for the revision of certain aspects of Michigan law. The findings and conclusions reached in my report were based upon national data and Michigan related data, at least a portion of which was gathered specifically to assist me as special counselor. Despite the Michigan-specific nature of some of my report, I feel positive that the products liability litigation landscape in Michigan fairly approximates the situation in most of the Nation.

In my view the major problem facing the American business community, particularly the small to moderate size business community, involves the cyclical nature of the liability insurance market. Insurance related problems and unique features of work place related products liability litigation are both areas in need of attention. Substantial swings in the cost and availability of liability insurance have had and will continue to have a detrimental impact on commerce.

Specifically, small to moderate scale enterprises encounter great difficulty in maintaining their presence in the marketplace during periods when liability insurance is not available or is prohibitively expensive. This is because they cannot protect their distributors, and when they cannot protect their distributors, their distributors decline to distribute their products.

The businesses that bear the most acute impact of the insurance cycle are those enterprises which make up the durable goods sector of the economy, especially manufacturers of industrial equipment

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[1] The report was not reproducible.

and machinery. These smaller scale enterprises lack the resources to self-insure, and actual and/or anticipated costs of liability coverage drive them from the market. A very substantial portion of the dollars paid out for products liability claims involve work place related accidents. I was in this regard pleased to see the GAO report and the testimony today which I think confirms the work related nature of products liability litigation or a large segment of it.

During the past decade much of the debate surrounding products liability litigation has been based upon anecdote and intuition. Hard data describing the products liability landscape are scarce.

One theory has emerged blaming the civil justice system for the insurance crisis. One hears that jury verdicts, unfair awards of punitive damages, and the dramatic escalation of claims filing activity has damaged the ability of American enterprise to compete in the global market.

Newer and better data and analysis thoroughly discredit that view of products liability law in the civil justice system. Verdicts and settlements in products liability cases are not erratic and appear reasonably related to economic losses of sustained and injury severity. Further, the frequency of case filings does not show an alarming trend. Case filings can largely be explained in terms of episodic activity associated with particular product lines. Punitive damage awards are not an explanator of liability insurance unavailability.

Given my view that products liability and work place related injuries are the central area of concern, let me now address S. 1400.

S. 1400 misses the target by a wide margin. Its attempt to abolish joint and several liability with respect to noneconomic damages is error. Joint and several liability is the fairest method of allocating risk among multiple wrongdoers.

The bill's sections related to punitive damages and retailer liability are basically irrelevant because those really have not provided the problems that we have experienced over the last decade.

Title II, which relates to expedited product liability settlements, is perhaps novel and interesting—and I am a fan of ADR, by the way—but riven with potential problems. For example, the time limits provided in section 201(d) do not allow adequate time for discovery. Nevertheless, the provision holds a plaintiff's claim hostage by threatening the imposition of costs, including reasonable attorney's fees. I might add on that note that a more important defect has to do with the incorporation by reference of state ADR procedures, many of which are very, very suspect.

As to work place injuries, S. 1400 fails to address the real issues. The data demonstrate that a much greater level of deterrence is needed with respect to work place accidents, lawless and grossly negligent employers have been effectively shielded from the readily foreseeable consequences of their conduct.

In summary, S. 1400 does not address the pressing and fundamental issues in products liability law as I see them. It fails to address the insurance related issues. It fails to establish an institutional method of monitoring products liability litigation, and it does not sufficiently address the real issues related to work place safety.

With respect to just several brief comments, the various things that have been said about the European Community I am greatly troubled about, and I think that they may be greatly in error.

It is true that the European Economic Community has something called the EEC directive on products liability. It is also true that a number of the member states by now have incorporated that directive into their national laws, as required by the directive. But it is important to note that that law as incorporated in each of the 12 member states is supplemental. It is not in derogation of each member state's substantive tort law. And so, side by side, they will have a dual system operating.

More importantly, as the literature and I think the preamble to the directive establish, the purpose for adopting the directive was to shift greater costs to manufacturers. As you may know, Europe or many of the nations in the member state enjoy wonderful social insurance systems, system which will guarantee an injured worker 100 percent of his wage for a minimum of two years and 70 percent thereafter, funding sources which will remodel work places and accident places in an attempt to put the injured worker back to work. In fact, the taxpayer, including employer/employees, in Europe have been subsidizing defective products.

In the EEC parliament's wisdom, the notion was let's go to a strict liability approach, which is really a negligence approach in many respects. Let's model that essentially on 402(A) of the restatement in the United States. And let's in that way kind of preserve the social insurance funds and get manufacturers to ante up. And so, that is one of the fundamental principals underlying their shift to that.

The second major point is that they have incorporated joint and several liability into that, perceiving it to be a fair way of allocating responsibility amongst multiple tort-feasors.

Lastly, the jury is still out on the question of what the EEC directive is going to be. Each one of those member states has a shot at interpreting the provisions, as I argue in my article. Forum shopping or let's say forum selection will abound. There are going to be problems.

I think if I am out of time I better stop.

[The following information was subsequently received for the record:]

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JAMES J. BLANCHARD
GOVERNOR

May 19, 1989

Governor James J. Blanchard
Governor of the State of Michigan
The Capitol
Lansing, Michigan 48903

Dear Governor Blanchard:

I have the pleasure and honor of sending you the accompanying report as the Governor's Special Counselor on Products Liability. I want to thank you for the honor of serving you and the people of the State of Michigan. I am grateful for the assistance provided by the many individuals who spent numerous hours in meetings, discussion groups, hearings and other activities sharing information that has enabled me to compile my report. I would like to acknowledge the contribution of Chief Judge Richard Kaufman. His insights and data, drawn from the experiences of the Third Judicial Circuit Court, were very helpful. The Detroit Bar Association and the Michigan Bar Association were also most cooperative and helpful.

The report is a distillation of the information and data I received from various sources. Four public hearings were convened and a substantial number of small meetings were held. Information received through formal testimony and informal discussion formed the basis upon which to conduct further investigation. Naturally, relevant literature from periodicals, government reports and law journals also guided my research focus. Ultimately, the Products Liability Task Force sponsored a survey of manufacturers. In addition, I conducted a Court Docket Study which reviewed products liability cases which were closed in calendar year 1987. Anne Vrooman and Dr. Barbara Price of the Wayne State University Business School worked to complete the Court Docket Study in a very condensed period of time.

On the basis of all of the information that was made available to me I have reached the following conclusions:

a) That the insurance crisis involving the twin hammers of rate escalation and insurance unavailability has abated;

b) That the recurring nature of the insurance crisis is principally driven by the insurance industry business cycle;

c) That the principal impact of the crisis hits small and moderate scale enterprises;

d) That the industrial equipment and manufacturing enterprises are most greatly affected by the insurance crisis;

e) That workplace products liability accidents account for more than 50 percent of the money paid to plaintiffs in products liability cases; and

f) That the modification of the rules governing venue and the common law collateral source rule will provide a substantial savings to defendants in products liability cases.

These findings are the basis for my recommendations. The key to providing stable liability insurance for Michigan businesses is to be found in the regulation of the insurance industry.

The recently adopted tort reform package, particularly as it relates to the collateral source rule and venue for civil cases, necessarily involves a substantial adjustment of the tort/compensation system and a resultant shift of dollars away from products liability claimants and to typical defendants in products liability cases. This shift has most affected large or relatively large manufacturing and retail enterprises. The actual savings were not capable of quantification given the scope of my investigation. Although benefiting relatively large scale enterprises, it does not appear that this savings is being returned to smaller scale enterprises in the form of reduced insurance premiums.

Currently, insurance premium rates appear to have stabilized at levels which are substantially below premium rates in 1985-86. Smaller manufacturing and retail businesses and new manufacturing enterprises are, however, not immune from the insurance business cycle and insurance practices which may ultimately result in a new episode of insurance unavailability and unaffordability. In the main, it is this sector of the economy to which the greatest attention must be paid.

Steps should be taken to develop a deeper understanding of insurance practices as they relate to small and moderate scale enterprises. Great caution must be exercised regarding current and future proposals for substantial reform of the civil justice system as it relates to products liability. Many of the proposed reforms discussed in public hearings and private meetings would have the effect of radically altering the deterrence and compensatory functions of the products liability segment of our tort law. My investigation leads me to the conclusion that our civil justice system, although not perfect, has produced substantial benefits, including the production of safer products and the distribution of much needed funds as compensation to the victims of product related accidents.

I therefore recommend that the following steps be taken.

1) Development of a Michigan Standard Jury Instruction which reasonably informs jurors of the consequences of the doctrine of joint and several liability;

2) Repeal of Michigan's insurance company anti-trust exemption;

3) Amendment of the Insurance Code (MCLA 500.3020) to provide for a minimum 45 day notice of cancellation of insurance;

4) Development of an on-going Market Assistance Program and legislation requiring independent actuarial evaluation;

5) Appointment of a Liability Insurance Task Force charged with responsibility for (a) developing JUA legislation, (b) evaluating the laws governing insurance cancellation and non-renewal, (c) evaluating the use of flex rating; evaluating existing insurance company reporting requirements, and (d) evaluating existing state resources allocated to insurance company regulation;

6) Conduct of periodic closed claims studies for products liability and other major tort claims;

7) Development of a data gathering system analogous to the Nielsen survey which would operate for a period of two years;

8) Development of legislation authorizing a limited right of action by products liability defendants against grossly negligent employers;

9) Development of legislation establishing a reasonableness standard for damages allocable to noneconomic injury; and

10) Development of a standard judicial reporting system for

products liability case filings, verdicts and settlements.

11) Development of a program which places products liability cases and other complex personal injury cases on a special docket which will guarantee a trial date certain.

12) Modification of the Michigan laws governing the amount in controversy for the Circuit Courts to reflect a minimum amount in controversy of $50,000.

These recommendations are linked. They touch insurance related issues and major doctrinal issues in the law. In addition the recommendations provide a basis upon which to maintain an on-going assessment of the civil justice system and insurance issues. The development of data over time will provide a basis for you and the citizens of Michigan to determine at some future point whether further measures are necessary.

Once again, I would like to thank you for the opportunity to serve the people of the State of Michigan.

Very truly yours,

Lawrence C. Mann
Governor's Special Counselor
On Products Liability

EXECUTIVE SUMMARY

The insurance related concerns of government, industry and concerned citizens have triggered discussion regarding products liability law in every state of our nation. Insurance touches every nook and cranny of our society. Contractions in insurance availability and dramatic price escalation threaten the normal conduct of business.

In Michigan, the Products Liability Task Force has urged that products liability law be modified. The proposed modifications include (a) caps on damages for noneconomic harm, (b) elimination of joint and several liability, (c) establishment of an alcohol and controlled substance defense, and (d) establishment of a government and industry standards defense. In June of 1988, I was appointed as Governor James Blanchard's Special Counselor on Products Liability. In that capacity I have conducted public hearings, convened meetings and commissioned two studies.

The first study was sponsored by the Products Liability Task Force. More than 2700 Michigan manufacturers were mailed questionnaires which required that each respond to a series of questions seeking data related to costs, insurance and case filings. The second study, the Court Docket Study, extracted the case numbers for the majority of products liability cases reported as closed in calendar year 1987 from the dockets of the Circuit Courts in Kent, Wayne and Ingham counties. Attorneys were interviewed by telephone. Both studies were motivated by the desire to obtain verifiable data regarding products liability law. Too frequently, the national and local debate has been fueled by rumor and anecdote.

The survey of manufacturers did not substantiate the contention that the period from 1979 to the present has involved an explosion in products liability case filings. Rather, case filings are episodic and appear to be associated with the product lines of specific manufacturers. A handful of manufacturers account for a substantial majority of all cases filed. The principal concern of the manufacturing community is insurance cancellation. Insurance cancellation was the impact most frequently identified by the 221 companies who responded. The next most frequent manufacturer response was that products liability caused safer products and safer work practices. The survey revealed very few cases involving alcohol or a controlled substance. Unfortunately, the survey of manufacturers did not accumulate any meaningful data regarding the actual costs of products liability claims.

The Court Docket Study was designed to supplement the data obtained through the survey of manufacturers. The preliminary results indicate that workplace related products liability claims play a unique role. They account for less than 50 percent of the cases filed, but account for more than 50 percent of the money actually paid to products liability claimants. The mean or average amount assessed in workplace related claims was more than four times the amount assessed in non-workplace claims ($165,490/$40,000).

The data regarding collateral source payments indicate that a segment of the cases involve substantial payments from medical insurance, medicaid, social security and other sources. The data therefore suggest that for some cases involving these collateral payments the modified collateral source rule will greatly benefit defendants.

The data regarding amounts paid by defendants show a much greater range in Wayne county as compared with Ingham and Kent counties. This phenomenon suggests that certain cases are worth more in Wayne county. The recent modification of the rules governing venue are therefore likely to yield a savings to defendants. Anecdotal evidence suggests that an increasing number of cases are being transferred from Wayne county to other courts.

The data also indicate that damages for noneconomic harm do not play as significant a role as suspected. For cases involving settlements or verdicts of $100,000 or more, the inability to return to prior employment, the magnitude of special damages (economic injury) and the magnitude of medical expenses are the best explanators.

On the basis of the data from the two studies and other information made available through the other facets of the fact-finding process, I have made the following findings of fact:

a) That the insurance crisis involving the twin hammers of rate escalation and insurance unavailability has abated;

b) That the recurring nature of the insurance crisis is principally driven by the insurance industry business cycle;

c) That the principal impact of the crisis hits small and moderate scale enterprises;

d) That the industrial equipment and manufacturing enterprises are most greatly affected by the insurance crisis;

e) That workplace products liability accidents account for more than 50 percent of the money paid to plaintiffs in products liability cases; and

f) That the modification of the rules governing venue and the common law collateral source rule by Public Act 178 of 1986 rule will provide a substantial savings to defendants in products liability cases.

On the basis of the aforementioned findings of fact, I recommend that the following measures be taken:

- Repeal of Michigan's insurance anti-trust exemption and endorsement of similar changes in federal anti-trust laws;
- Amendment of the Insurance Code (MCLA 500.3020) to provide for a minimum 45-day notice of cancellation of insurance;
- Development of an on-going Market Assistance Program and legislation requiring independent actuarial evaluation;
- Appointment of an Insurance Task Force charged with responsibility for (a) developing JUA legislation, (b) evaluating the laws governing insurance cancellation and non-renewal, (c) evaluating the use of flex rating; evaluating existing insurance company reporting requirements, and (d) evaluating existing state resources allocated to insurance company regulation;
- Conduct of periodic closed claims studies for products liability and other major tort claims;
- Development of a data gathering system analogous to the Nielsen survey which would operate for a period of two years;
- Development of legislation authorizing a limited right of action by products liability defendants against grossly negligent employers;
- Development of legislation establishing a reasonableness standard for damages allocable to noneconomic injury; and
- Development of a standard judicial reporting system for products liability case filings, verdicts and settlements.
- Development of a program which places products liability cases and other complex personal injury cases on a special docket which will guarantee a trial date certain.
- Modification of the Michigan laws governing the amount in controversy for the Circuit Courts to reflect a minimum amount in controversy of $50,000.

These recommendations focus on several aspects of the problems identified through the data and the other facets of my work. The individual proposals are linked. Increased scrutiny of the casualty-liability insurance industry, the development of enhanced data, and moderate changes in the law provide a balanced approach to the problems identified by the manufacturing community.

WAYNE STATE UNIVERSITY
LAW SCHOOL
DETROIT, MICHIGAN 48202

April 3, 1990

Senator Richard H. Bryan
Chairman
Consumer Subcommittee
Committee on Commerce, Science & Transportation
Room 227 Hart Senate Office Building
Washington, DC 20510

Dear Senator Bryan:

This is in response to your correspondence dated March 27, 1990.

Question 1: Isn't is possible that one reason you did not find a liability 'crisis' in Michigan is that Michigan law already reflects various elements called for by proponents of tort reform? For example, (1) a plaintiff's use of drugs or alcohol can be brought in as evidence of comparative negligence and thus reduce any recovery; (2) punitive damages cannot be abused because there are no punitive damages in product cases under Michigan law; (3) Michigan has abolished strict liability for design defect and warning cases and instead demands proof of negligence.

ANSWER: Current Michigan law does, under certain limited circumstances, allow for the admission of evidence suggesting drug or alcohol consumption. Where such evidence is admitted, it is the conventional wisdom that it is very damaging to the plaintiff's case. Punitive damages are not recoverable in Michigan. Thus, it is certainly correct that they cannot be abused. Finally, Michigan, as is true of a majority of states, has developed a negligence standard for design and warning cases. This is also true for many of the states that profess to have a so-called strict liability approach.

Question 2: Isn't it true that your study found that, although product liability litigation and costs do not presently pose a significant threat to the fiscal well-being or competitiveness of large-scale Michigan enterprises, they do cause significant problems for smaller businesses? (p.VI.15)

ANSWER: There is no doubt that at certain periods of the liability insurance cycle, smaller scale enterprises experience great stress. This stress, however, is not evenly distributed among all sectors of the economy. Moreover, it is not reasonably related to claims experience or tort doctrine. It appears that the retail sector is typically the least affected by the problem. Small-scale enterprise is particularly vulnerable because of its reduced bargaining power in the liability insurance market. The reforms embodied in S 1400 would not address the issues affecting small-scale businesses. The areas that are in need of immediate reform include the manufacturers of durable goods used in the workplace and pharmaceuticals. The current Bill does not sufficiently address these areas.

Question 3: Many of your conclusions are based on the results of your survey of Michigan businesses. However, you admit that the response rate, about 8 percent, is far less than the rate needed to sustain hard conclusions. Nevertheless, you base your findings on the 8 percent figure, and then say that the low response rate by itself is arguably evidence that product liability law is not currently having a substantial or acute impact on the vast majority of Michigan businesses (p. V.3). Haven't you loaded the deck by beginning with a response rate too low to support meaningful conclusions and then using that low response rate as an excuse for creative interpretations of your results?

ANSWER: It seems to me that the businesses in Michigan were provided with an opportunity to present their case. Their failure to come forth with data supporting some of the broad claims advanced in testimony and through other forms of argument suggests to me that the case may indeed be quite weak. That is, it has been repeatedly contended that product liability law was ruining the competitive capacity of Michigan businesses. The data available on a national level, which reinforce the data we were able to collect in Michigan, does not sustain the argument. The various studies by the GAO, Rand ICJ and Conference Board are consistent with my view of the products liability landscape. Please note that I refer to the original survey completed by the Conference Board and not their subsequent public relations effort. Moreover, the low response rate to the CMA Study stimulated us to develop a survey of court records and interviews of plaintiff and defense counsel. It is my feeling that the results of the second study corroborate my findings of fact and recommendations to the Governor of Michigan.

Sincerely,

Lawrence C. Mann

LCM:mk

Senator **Bryan**. Thank you very much, Professor Mann. We will follow that up with a line of questions.

Mr. Fark, we will hear from you now, sir.

STATEMENT OF HOWARD FARK, VICE PRESIDENT, MINSTER MACHINE COMPANY, MINSTER, OH

Mr. **Fark**. Thank you, Mr. Chairman.

From a machine tool builder's perspective, the current product liability system fosters confusion, unfairness and extremely wasteful transaction costs. It serves as a cruel lottery for both claimants and manufacturers, depending more on geography than justice.

My lawyers tell me that some appellate courts are now trying to correct some of the unfair rulings of the past. They also tell me that these new decisions could be overruled tomorrow by still newer ones. Only one thing is certain and that is that the litigation process is rife with uncertainty. Courts adopt new and often conflicting rules virtually on a daily basis.

And to make matters worse, the judge-made rules are retroactive in their application. It is as though you are driving down the highway with all the speed limit signs pointing in the opposite direction. You do not know the speed limit until you observe the signs in your rear-view mirror.

During 1988, the median company in the machine tool industry in this country was forced to spend seven times more on product liability costs than it was able to spend on basic research and development.

The Insurance Services Office reports that in 1984 American industry, our customers, spent more money to pay lawyers to defend them in product liability suits than they spent on buying new American-built machine tools to improve their productivity and their competitive position.

An earlier ISO report indicated that for every six dollars going to claimants, seven dollars go to lawyers on both sides of the counsel's table.

Senator Hollings earlier this morning has repeatedly stressed that most of the transaction costs associated with the system are paid to our own lawyers, defense attorneys. Not only do we not dispute this, we think Senator Hollings has helped make our case. The defense costs that we pay out would be substantially reduced if the law is made more uniform and clear.

Because the United States is only a partial market for most foreign machine tool builders and because product liability rules in foreign countries are much less cumbersome and significantly more uniform and defense-oriented than in the U.S., the product liability costs of foreign machine tool builders are substantially less than ours.

Thirty percent of our industry's claims involve machines produced over a quarter of a century ago. In my own company, this percentage exceeds 50 percent. We have had to defend claims on machines as old as 50 years. While we almost always successfully defend these lawsuits, the litigation results in unnecessarily high legal and transaction costs.

In contrast, foreign machine tool builders do not bear the significant, long-tail exposure of the U.S. builders because the import incursion of foreign machine tools is only a very recent event.

Preliminary results of NMTBA's 15th annual product liability survey indicate that adoption of S. 1400 would result in our members and/or their insurers reducing their product liability costs by almost two-thirds without materially reducing the amount received by claimants. Our written statement documents these findings.

Mr. Chairman, I believe this is the eighth time since 1982 that NMTBA has testified before this committee on product liability reform. I know I made a prior presentation seven years ago addressing these very same concerns. Countless hearings have been held on this issue over the past decade. In 1986 the committee held six days of markup crafting a bill closely resembling S. 1400.

The bill before you is the product of hours of deliberation and compromise. Product liability is an issue whose time has come. Now is the time to act. S. 1400 is fair. It is balanced. It will reduce unnecessary transaction costs and should be promptly enacted.

Thank you.

[The statement and questions and answers follow:]

STATEMENT BY HOWARD FARK
SENIOR VICE PRESIDENT
THE MINSTER MACHINE COMPANY
AND
DIRECTOR, NMTBA - THE ASSOCIATION FOR MANUFACTURING TECHNOLOGY
BEFORE THE
SUBCOMMITTEE ON CONSUMER
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
FEBRUARY 22, 1990

I. INTRODUCTION

Good morning, my name is Howard Fark. I am Senior Vice President of The Minster Machine Company in Minster, Ohio and Beaufort, South Carolina. I am also a member of the Board of Directors of NMTBA - The Association For Manufacturing Technology. Accompanying me today is James H. Mack, NMTBA's Vice President of Government Relations.

NMTBA is a trade association whose membership includes over 300 machine tool building firms with over 400 locations. America's machine tool industry builds and provides to a wide range of industries the tools of manufacturing technology including cutting, grinding and forming machines, universal measuring machines, and automated manufacturing systems.

II. THE NEED FOR FEDERAL PRODUCT LIABILITY REFORM

I appreciate the opportunity to appear before this Subcommittee and address a problem confronting many U.S. manufacturers -- the product liability system. The current product liability system fosters confusion, unfairness, and wasteful transaction costs. It serves as a cruel lottery for both claimants and manufacturers, depending more upon geography than justice. As a general rule, it provides disproportionate enrichment for lawyers on both sides of the counsel table.

The unevenness in the product liability system stems primarily from the fact that the rules determining the liability of manufacturers and product sellers for product-related injuries have been developed almost exclusively by state court judges on a case-by-case basis.

My lawyers tell me that some appellate courts are now trying to correct some of the unfair rulings of the past. They also tell me that these new decisions could be overruled tomorrow by still newer ones. Only one thing is certain, they tell me, and that is that the litigation process is rife with uncertainty. Courts adopt new -- and often conflicting -- rules virtually on a daily basis.

And to make matters worse, the judge-made rules are retroactive in their application. It's as though you were driving down the highway with all the speed limit signs pointing in the wrong direction. You wouldn't know the speed limits until you saw them in the rear-view mirror.

Under the current product liability system, everyone is hurt -- the manufacturer; the injured claimants, who may be left uncompensated if all the manufacturers' resources are depleted due to the lack of available, affordable insurance; and the public, who are denied access to products.

In addition to its adverse effect on interstate commerce, uncertainty in the law of product liability has also resulted in transaction costs which are intolerably high. The median company in the machine tool industry is forced to spend seven times more on product liability costs than it is able to spend on basic research and development. The Insurance Services Office (ISO) reports that, in 1984, American industry -- our customers -- spent more to pay lawyers to defend them in liability suits ($2.8 billion) than they spent on buying new American-built machine tools to improve their productivity. An earlier ISO survey indicated that for every six dollars going to claimants, seven dollars goes to lawyers on both sides of the counsel's table.

Unquestionably, the cost of resolving product-related claims has risen sharply in recent years -- due largely to lengthy litigation over applicable rules of liability. Spiraling product liability costs have put U.S. manufacturers at a competitive disadvantage, because the United States is only a partial market for most foreign machine tool builders, and because product liability rules in foreign countries are much less cumbersome and significantly more uniform and defense-oriented than in the United States. As a result, the product liability costs of foreign machine tool builders are substantially less than those of their domestic counterparts. For example, the European Economic Community recently established a uniform product liability law which is intended to impose uniform rules for litigation throughout the community.

Uncertainty in the tort litigation system is also reflected in product liability insurance rates, which have been noticeably erratic during the past decade. Insurers, like the product sellers they insure, are unable to accurately predict potential liability due to the disparity in state laws. Consequently, their rates are set conservatively to cover a "worst case" scenario. In some instances, the rates are so conservative that product sellers are precluded from obtaining affordable coverage. Without insurance, product sellers may be bankrupted by a single product liability judgement -- or worse, injured claimants may have no way to fully recover their damages.

Perhaps more importantly, product liability insurance costs are significantly affected by older products. Under product liability law today, in the majority of states, potential liability for products is endless -- literally "forever." My own company has been involved in dozens of product liability cases involving products that are decades old! While we almost always "win" these lawsuits, the litigation nevertheless results in unnecessarily high legal and transaction costs. Insurers know this, and factor it into insurance premiums.

In contrast, the incursion by foreign machine tool builders into the U.S. market is fairly recent. Therefore, foreign machine tool builders do not bear the significant long-tail exposure of U.S. builders.

S. 1400, The Product Liability Reform Act, provides clear and balanced legal guidelines; will reduce the extraordinarily high transaction costs currently associated with product liability claims; will help stabilize the insurance market; and will provide clearer rules to help manufacturers make safer products. S. 1400 will enhance U.S. manufacturers' ability to compete more effectively in this country and abroad.

III. PRELIMINARY RESULTS OF NMTBA'S 15th ANNUAL PRODUCT LIABILITY SURVEY

Preliminary results of NMTBA's 15th Annual Product Liability Survey (based on 76 returns) indicate that 25 percent of NMTBA members have no product liability insurance and that they and/or their insurers could reduce their product liability costs by almost two-thirds, through adoption of a federal product liability statute (such as S. 1400).

The average premium is $104,300 (down 9 percent from $114,500 in 1989, but up 76 percent from $59,100 in 1985). One-fourth of the respondents have no insurance at all (mostly because they found their carriers' proposals to be too expensive, although some could not even get a proposal); and 37 percent of those companies with annual sales in excess of $2.5 million have no umbrella policy to protect against catastrophic claims. Eighteen percent of the respondents have become participants in TARRGA -- NMTBA's new risk retention group.

Average premiums rose sharply during the late 1970s, hitting a peak in 1979. They reduced significantly from 1980 to 1983, as interest rates escalated and insurance underwriters competed for premium dollars to invest. However, premiums rose in 1984 for the first time since 1979, and 1986 levels exceeded the peak of the mid-1970s insurance crisis. 1987 was even worse with premiums continuing to rise and the number of companies "going bare" exceeding the 1979 levels. 1990 figures indicate that premium levels are going down to their 1986 levels (which were the highest in history up to that time), but that the number of companies "going bare" has gone up slightly.

Of 79 closed claims reported from 1989, 63 percent were settled for an average of $38,500; 12 percent were won by NMTBA members in the courtroom; and the remaining 25 percent were dropped without awards being paid. One-third of the respondents reported resolving claims in 1989. In addition, 162 claims were pending at year's end -- an average of 6.5 per company involved in litigation.

NMTBA's survey results indicate that every 100 claims filed against machine tool builders last year "cost" $2.6 million -- including $0.7 million in defense costs and $1.5 million in subrogation paid to employers and/or their workers' compensation carriers, regardless of employer fault or the lack thereof. In other words, the current system provides $0.4 million to claimants (less whatever they pay out in contingency fees, which average 33 per cent) and $2.2 million in transaction costs.

If product liability reform were adopted (not taking into account a fault standard), the "cost" of the same 100 claims filed against machine tool builders would be $1.0 million -- a $1.6 million savings. $0.4 million would still go to claimants. Virtually the entire savings would come from reduced transaction costs -- elimination of subrogation in most cases, lower defense costs and the 25-year statute-of-repose.

IV. SUMMARY OF S. 1400

The Product Liability Reform Act of 1989, introduced by Senators Kasten, Danforth, Inouye, and Rockefeller, is cosponsored by a bipartisan group of 26 Senators. The legislation reforms some of the unfairness, unevenness, unpredictability, and inefficiency which characterize the current product liability system. It does so by establishing fair and balanced guidelines which encourage manufacturers and product sellers to keep their products safe while protecting the rights of injured consumers.

S. 1400 abolishes joint and several liability for non-economic damages -- a provision which was endorsed by seventy-one percent of the voters in California. It moves toward making each defendant responsible only for his or her share of the harm in an accident, while protecting a claimant's ability to collect all of his or her economic damages.

S. 1400 makes the punitive damage system more rational and fair by creating a uniform standard for the imposition of punitive damages. This provision also establishes a defense for drug and medical devices that have pre-market FDA approval and for aircraft with pre-market certification by the FAA, and it provides for separate proceedings for determining liability and the amount of punitive damages -- thus preventing the introduction of prejudicial evidence into the main body of the trial.

The legislation includes other reforms designed to reduce unnecessary transaction costs such as: incentives for expedited settlements; a drug and alcohol abuse defense; and a product seller provision which makes product sellers liable for harm caused by their own fault.

I will devote the remainder of my statement to addressing two additional provisions of S. 1400 that most directly affect the machine tool industry -- the elimination of the subrogation lien and the 25-year statute of repose.

The subrogation lien -- a vehicle through which an employer can pass along his workers' compensation costs to a product manufacturer -- creates an egregious imbalance in the system and fosters excessive transaction costs. In most jurisdictions, the subrogation lien goes into effect regardless of employer fault.

Subrogation poses another major concern as well -- that of workplace safety. The subrogation lien, which permits a negligent employer to pass along the costs of an industrial accident to a third-party manufacturer, clearly acts as a disincentive to workplace safety by shifting the focus away from accident prevention where it will do the most good.

S. 1400 eliminates the unfair, unsafe and expensive results of the subrogation system by prohibiting the employer (and its workers' compensation insurance carrier) from pursuing a subrogation lien, except where the manufacturer or product seller has specifically agreed to hold the employer harmless or in those instances where an employer can prove to the trier-of-fact that he was completely without fault.

The employer, in exchange for giving up his right to pursue a subrogation lien, would receive substantial reinforcement of the immunity shield traditionally afforded by the workers' compensation system. This objective is accomplished in S. 1400 by preventing a manufacturer from bringing third-party suits against the employer. This compromise -- initially proposed by workers' compensation authority Professor Arthur Larsen almost twenty years ago -- has had the widespread support of all parties, including the insurance industry and organized labor.

The elimination of the subrogation lien would not affect an injured worker's ability to recover workers' compensation benefits or a product liability damage award; nor would it increase the workers' compensation insurance premiums of the overwhelming majority of employers. Enactment of S. 1400 would simply make clear that the costs of the workers' compensation system will be paid by the employer -- as was originally intended -- and not by the tort system.

Another major source of the imbalance, which today characterizes most product liability litigation is the fact that machine tools enjoy such longevity of use in the industrial workplace. It is not unusual for a manufacturer to be sued in connection with a machine produced more than one-half century ago -- a machine which changed hands several times and which the manufacturer did not even know was still in existence. NMTBA's survey data indicate that over 30 percent of our members' claims involve machines that are over a quarter-century old.

In my view, it is unfair to continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age. What the statute-of-repose does, as a practical matter, is to put an end to legal costs incurred by both sides in battling over issues concerning old, tired and often altered or misused products. It will not result in the widespread reduction of "valid claims." As a matter of fact, when a claim involving overage equipment proceeds through trial, NMTBA members invariably win. Juries recognize that, if a piece of heavy machinery has operated without incident for over twenty-five years, it is unlikely that the original builder is responsible for the accident. However, large sums are expended in defending the claim.

S. 1400 remedies this problem by establishing a 25-year time limitation on liability for traumatic injuries caused by capital goods. The 25-year statute-of-repose would apply only in those cases where the injured person is eligible to receive workers' compensation benefits and would not apply to occupational diseases or other toxic exposures.

V. CONCLUSION

S. 1400 sets forth fair and balanced product liability rules which would establish uniformity and restore clarity and certainty to the product liability system without in any way diminishing the rights of product users.

Mr. Chairman, I believe this is the eighth time since 1982 that NMTBA has testified before the committee on product liability reform. I know that I have made two prior presentations. Countless hearings have been held on this issue over the past decade. In 1986, the committee held six days of markup -- crafting a bill closely resembling S. 1400.

The bill before you is the product of hours of deliberation and compromise. Product liability is an issue whose time has come. Now is the time to act.

S. 1400 is fair; it is balanced; it will reduce unnecessary transaction costs; and it should be promptly enacted. Thank you. I would be happy to respond to your questions.

ANSWERS TO THE MAJORITY FROM MR. HOWARD FARK FOR THE RECORD OF THE CONSUMER SUBCOMMITTEE'S FEBRUARY 22, 1990 HEARING ON S. 1400

Question 1. You have testified that your survey of 76 members of the National Machine Tool Builders Association indicates that those members could reduce their product liability costs by 1/3 through the adoption of a statute such as S. 1400. On what basis do they reach that conclusion? Is this their opinion, or do they have calculations on which the result is based? If so, would you make those calculations available to the committee?

Question 2. Your survey also provides an estimate of the amount that would be saved by machine tool builders in product liability claims made against them if product liability legislation were enacted. How were these amounts calculated?

Answer: If I am reading the first two questions correctly, they are actually variations on the same question. I am attaching the final results of NMTBA's 15th Annual Product Liability Survey to supplant the preliminary results cited in my February 22nd testimony. The final results indicate that our members and/or their insurers could reduce their product liability costs by over 50 percent through adoption of a federal product liability statute, such as S. 1400, containing subrogation reform and a twenty-five year statute-of-repose. This conclusion is based on the following calculation:

Current System: Out of 100 claims, the amount of money going directly to claimants totalled $3.050 million -- one claim was won in the courtroom by the claimant for $1.085 million; 64 claims were settled out of court for a total of $1.965 million (an average of $30,700 per claim); and 35 claims were won by the defendant or dropped resulting in no money paid out.

Subrogation on 65 claims totalled $2.6 million (an average of $40,000 per claim).

Defense costs totalled $1.978 million.

Total cost of 100 claims to NMTBA members under today's tort system equals $7.628 million.

S. 1400: Under S. 1400, the amount going directly to claimants in those same 100 cases would total $2.802 million -- one claim would be won by the claimant for $1.085 million; 56 claims would be settled for a total of $1.717 million; subrogation on these 57 claims would be eliminated; and 43 claims would be affected by the 25-year statute-of-repose or alcohol and drug abuse defense.

Defense costs would total $0.981 million.

ANSWERS TO SENATOR ROCKEFELLER'S QUESTIONS

Question 1. Could you tell me what, if any, effect product liability law has on your ability to compete in international markets?

Answer: We have had very few product liability problems outside the United States. Our exports average approximately 25 percent of our total sales. We are able to buy insurance for our overseas sales at a premium of approximately 0.1 percent of overseas sales dollars. To the best of my knowledge, we have had no personal injury lawsuits outside the U.S., because foreign laws are much more pro-defendant than U.S. law.

In contrast to this situation, our domestic product liability costs (we are self-insured) average approximately 2.5 percent of our U.S. sales dollars. In other words, total product liability costs represent 1.9 percent of our company's sales.

A foreign competitor who sells 75 percent of his product in his domestic market and 25 percent in the U.S. would pay 0.1 percent of sales for product liability on his home market sales and 0.6 percent of sales for product liability on his U.S. exports.

Our product liability cost of 1.9 percent of sales and our foreign competitors' product liability costs of 0.7 percent of sales will be factored into our respective pricing mechanisms. As a result, in the world market (including the U.S.), we are at a price disadvantage when compared with a foreign machinery builder exporting to the United States or to third markets.

These figures may actually be understated when you take into account the fact that, in most states in the U.S., our equipment is subject to liability forever and that substantial imports of foreign equipment are a relatively recent phenomenon. The means that an American company that has been in business for a long time has exposure on old equipment, while the foreign company has exposure on fairly new equipment. Therefore, disparity in the U.S. product liability costs would be even greater than the above figures indicate.

Question 2. Could you describe some of the product liability lawsuits that your company has been engaged in and how it has affected your product prices to the consumer?

Answer: All of my company's lawsuits are the result of industrial accidents. As I stated in my testimony, in excess of 50 percent of these claims involve machines produced over 25 years ago.

The total cost of the same 100 claims under S. 1400 would equal $3.783 -- roughly 50 percent less than under current law.

Question 3. You have testified that uncertainty in the tort litigation system also is reflected in product liability insurance rates, which you suggest have been "erratic" in the past decade. However, many experts in the field attribute fluctuations in the insurance market primarily to insurance industry pricing practices and the cyclical nature of the insurance market rather than the tort system. Do you have any data to support your contrary view that fluctuation and rate increases were the result of the tort system?

Answer: Clearly, the cyclical nature of insurance premiums derive from the cyclical nature of the insurance industry. However, the cycle is compounded by instability in the tort system, and it is instability in the tort system which results in higher "valleys" in the insurance cycle. We don't expect S. 1400 to eliminate the insurance cycle. However, by making the system more predictable and eliminating some of the horrendous transaction costs associated with old products, subrogation, the spectre of punitive damages, etc., S. 1400 will contribute to making the cycle less erratic. My own company and many others are self-insured. We experience some of the same problems as commercial insurers. We aren't supporting S. 1400 because our insurance rates will decrease. We are supporting S. 1400 because it will provide stability in the tort system.

Question 4. You referred favorably to product liability changes made by the directive of the European Economic Community. One aspect of the European Community's liability directive is a strict liability standard, that is, liability for manufacturers of defective products without regard to fault. Is this a standard that you would endorse being applied on a uniform basis in this country?

Answer: The European Community directive has coupled the strict liability standard with a state-of-the-art defense, a 10-year statute-of-repose for all products including pharmaceuticals and toxic chemicals, joint and several liability for economic loss, no contingency fees, and no punitive damages. These measures, along with the elimination of subrogation included in S. 1400, would constitute a very strong, pro-defendant federal product liability statute, but we doubt it could be enacted. S. 1400 represents a much more modest approach.

S. 1400 contains no standard of liability. It does contain a 25-year statute-of-repose applied only to traumatic injuries attributable to capital goods (and then only if the claimant is eligible for workers' compensation). It eliminates joint and several liability for non-economic damages, but preserves it for economic loss. It does not eliminate punitive damages but sets the ground rules for thier application.

REPORT

NMTBA
The Association For
Manufacturing Technology

Direct Dial: (703)827-5226

PRODUCT LIABILITY

No. 42-90 March 28, 1990

FINAL RESULTS - 15th ANNUAL PRODUCT LIABILITY SURVEY

Final results of NMTBA's 15th Annual Product Liability Survey (based on 103 returns) indicate that 23% of our members have no product liability insurance and that they and/or their insurers could reduce their product liability costs by over 50%, through adoption of a federal product liability statute containing subrogation reform and a 25-year statute-of-repose.

Twenty percent of the respondents had sales under $2.5 million; 24% had $2.5 to $7.5 million in sales; 25% had $7.5 to $15 million in sales; 19% had $15 to $50 million in sales; and 12% had sales over $50 million.

Average premiums rose sharply during the late 1970s, hitting a peak in 1979. They reduced significantly from 1980-83, as interest rates escalated and insurance underwriters competed for premium dollars to invest. However, premiums rose in 1984 for the first time since 1979, and 1986 levels exceeded the peak of the mid-1970s insurance crisis. 1987 was even worse with premiums continuing to rise and the number of companies "going bare" exceeding the 1979 levels. 1990 figures indicate that premium levels are going down to their 1986 levels (which were the highest in history up to that time), but that the number of companies "going bare" has gone up slightly.

The average premium is $95,400 (down 17% from $114,500 in 1989, but up 61% from $59,100 in 1985). The average metal forming premium is $86,100. The average metal cutting premium is $98,800. Forty-one percent have deductibles or self-retentions averaging $89,600. Almost one quarter have no insurance at all (most because they found their carriers' proposals to be too expensive, although some couldn't even get a proposal); and 38% of those companies with annual sales in excess of $2.5 million have no umbrella policy to protect against catastrophic claims. Seventeen percent of the respondents have become participants in TARRGA – NMTBA's new Risk Retention Group.

The historical pattern over the last 15 years indicates that premiums swing wildly from year to year – but that each succeeding "valley" is higher than earlier "peaks." This swing syndrome will continue for so long as there is instability in the underlying tort law. Providing greater stability in the underlying tort law will foster greater stability in insurance premiums.

Thirty-six percent of the metal forming respondents and 29% of the metal cutting respondents reported claims in 1989. Fifty-three percent of the claims were reported by metal forming respondents, who represented only 27% of the sample. Sixty-eight percent of the claims were brought in state courts and 32% in federal courts.

Of 104 closed claims reported from 1989, only 12% actually reached trial. Of those, 92% were "won" by our members. Sixty-four percent of the claims were settled for an average of $70,700; 11% were won by our members in the courtroom; one percent were won by claimants for an average verdict of $1,125,000; and the remaining 24% were dropped without awards being paid. In addition, 219 claims were pending at year's end -- an average of 6.5 claims per company experiencing litigation.

Whether cases are won, lost, or settled -- defense costs for our members are substantial. The Insurance Services Office (ISO) closed claims study shows that for every $6 paid out to claimants by insurance companies for product liability, another $7 is paid for lawyers and other transaction costs. According to a 1984 ISO study, American industry spent more on lawyers to defend themselves in product liability suits than they spent to buy new machine tools to improve their productivity. Last year, the median company in our industry spent seven times more on product liability costs than they spent on basic R & D.

These transaction costs will be reduced substantially, if Congress enacts a federal product liability reform statute. For example, 35% of the claims would be eliminated if the 25-year statute-of-repose for capital goods contained in the current legislation were adopted. Subrogation reform would also significantly reduce transaction costs, because it will eliminate litigation between manufacturers and employers over who is to pay for workplace injuries (amounts ultimately paid to injured workers in individual cases will be unaffected); it will also provide an incentive for safer workplaces, thus eliminating many workplace injuries and the resultant litigation. Ninety percent of the claims reported by our members resulted from employer fault. Eight percent would have been affected by an alcohol/drug abuse defense.

Based upon these survey results, every 100 claims filed against machine tool builders "cost" $7.6 million -- including $2.0 million in defense costs and $2.6 million in subrogation paid to employers and/or their workers' compensation carriers, regardless of employer fault or the lack thereof. In other words, the current system provides $3.0 million to claimants (less whatever they pay out in contingency fees, which average 33%) and $4.6 million in transaction costs.

If product liability reform were adopted, the "cost" of the same 100 claims filed against machine tool builders would be $3.7 million -- a $3.9 million savings; $2.8 million would still go to claimants. Virtually the entire savings would come from reduced transaction costs -- elimination of subrogation, lower defense costs and the 25-year statute-of-repose.

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Senator **Bryan**. Thank you very much, Mr. Fark.

Professor Henderson, the first question for you, if I may. Looking at this thing from a broad perspective as you are able to do as an academician, assuming the data that you have provided are in fact reflective of what is happening out there in the litigation world, I am impressed with the depth of feeling on the part of those who are in the manufacturing business and others who describe our system as inefficient, the transaction costs, the length of the tail, the statute of repose, all those kinds of problems. If this is not the answer in your judgment, ought we to be looking at some other areas?

I gather that you on these trips back and forth from Ithaca to Washington, as the trial lawyers and the consumer advocates might say, you have found a road to Damascus and now have recanted your previous position. But you do not sound like one who completely rules out the possibility of some Federal action, and you do not seem to rule out the possibility that maybe we need to look at the system and fine tune it.

Share with me, and it will be part of the record here. Does the system work right? Do we need to make some changes and refinements to ensure that we are competitive?

Mr. Fark is in an industry that I know a little bit about. In 1970, Mr. Fark, your industry, the machine tool industry in America, had 100 percent of the American market.

Mr. **Fark**. That's right.

Senator **Bryan**. As of two years ago, those numbers had declined to between 35 to 40 percent. Now, I am not here to suggest that that is all as a consequence of the transaction costs and the other arguments that have been made.

But frankly there are those of us who are concerned. And since we have you here today, maybe you can share with us your own perspective, Professor Henderson.

Mr. **Henderson**. Sure, Mr. Chairman. I was aware coming in here as an old war horse what I had to say would be of interest to those advancing this measure, and I do not really feel myself a complete turncoat or a reborn anything.

I have a lot of problems with the existing system, and I have written about them for 20 years. And I have not changed my mind on the substance of much of it. I have gone recently to several state legislatures in support of proposals there that I thought were measured and sensible.

What this study that we conducted last summer has done for me is to suggest that in terms of trends, that we are in the midst—and we trace it back to perhaps the early to mid-1980s. If we showed more data on that chart, you would see that off to the left, if we extended it, it would be flat and perhaps curving the other way. So, what you are looking at graphically is the throes of this trend, and we would expect it to continue. We do not see any reason nor, may I say anecdotally, does anything I have read recently suggest that it has turned around.

Now, yes, I think there is room, certainly, for the Congress to consider a more limited measure. I suppose if I have changed, it is in the degree to which I would support extensive, serious intrusion into state law. And if I read S. 1400 correctly, I do not see such an intrusion. Nothing that has been said today suggests to me that it begins to approach the kind of intrusions that we were talking about 10 years ago.

So, I may appear to be having it both ways, but we did look at the data. And I would like Ted to react to this. We did look at the data. And he also might speak to where we are going with this because our story has only begun I'm afraid to say. We have the data. They are coded to every jurisdiction in this country, and I think without any false modesty we might begin to shed some light over the next year or so on some of the questions asked today because our data would permit us to compare all 50 some odd jurisdictions that comprise the United States product system. So, there is room I think for Federal reform.

I have looked at the bill hastily. I confess I was supplied it only recently, but it is, after all, a recent measure. And it strikes me as far more, I will use the word, "conservative" in its approach. It is far less intrusive than the proposals in the old days.

There are some things in here that quite clearly one would not expect a court to do or, for that matter, state legislatures to do so effectively as might the Congress. And the exercise that ought to be undertaken in my view would be to use the criteria, identify those areas, and then ask oneself does the bill adequately address.

I am not in a position to go as far as Larry went in criticizing it. I would want to have more of a chance myself to study it. But the agenda reflected in this bill seems to me by and large to conform to the criteria I advanced in my testimony.

Senator BRYAN. Let me follow up just with one other question. Then I will ask a few questions of the other witnesses.

Putting aside and accepting for the moment that the trend line toward defense verdicts is increasing—let's accept that for purposes of our discussion—is the system in need of some change to, in effect, protect America's competitive position, to loosen the restraints that at least manufacturers seem to feel in terms of product introduction, development, the things that kind of impede their ability to compete from their perception? What is your sense on that?

Mr. HENDERSON. Now, just for the record, you have asked me to put another hat on and I am perfectly happy to wear it.

I am not sure you can answer the question that you just put based on our data. What we tried to do is just tell it like it is. You have accepted that we are accurate.

Senator BRYAN. Yes.

Mr. HENDERSON. Okay.

Now, with my other hat on——

Senator BRYAN. You know, I did not get to ask professors any questions when I was in law school, Professor Henderson. So, this is a real opportunity.

Mr. HENDERSON. Well, you ought to come back to one of the law schools. I think Ted would agree and Larry. And you ought to spend a day in one of them, and it would shock your socks off I think.

Senator BRYAN. We didn't get much beyond *McPherson* v. *Buick*. That's about where we stopped. I think there has been some change in the law, as I understand, since then.

Mr. HENDERSON. A little bit, although some of the old stories are the best ones.

Anyway, I would think, yes, if you asked Jim Henderson with his hat as critic of all of this, yes, I think that the system needs some change. And whether it could come from the courts over time, if I were sitting in the position he is sitting, getting thrashed as he sees the world, and I told him wait another decade and it may work out, I think he would—well, I would want to say that in a cab headed for Ithaca.

So, there is a time factor in there. How soon do we have to act and all of that?

But, yes, I remain a critic of quite a bit of what is going on. I just am a little more heartened in the sense the courts are going to help. You could almost argue now would be the time for a modest reform because the courts won't buck it and fight it as much as go with it. They will go with the flow. You could make that argument.

Senator BRYAN. Well, I gather by the tenor of your comments, things are getting better from the perspective of liability.

Mr. HENDERSON. Yes.

Senator BRYAN. Your Honor, Judge Eginton, if I might direct a question to you. Having examined S. 1400 from your perspective, assuming the premise that change is necessary, S. 1400 is proclaimed to do an awful lot. The critics would claim it is devastating. The proponents seem to concede that a level playing field will be established. I am reading the legislation. How much does it do? Does it really do the things that need to be done from your perspective, assuming again these problems in the system that you find?

Mr. EGINTON. Well, Jim and I are both old war horses, and we both agree that S. 1400 is not nearly what S. 44 was as far as being a controversial, far-reaching piece of legislation. I think it is a fairly modest proposal.

There are two things you can say about it. The various provisions on punitive damages, on the statutes of limitations and repose are three very important areas where uniformity would help a great deal. It would not make any difference then, if I were sitting in Connecticut, whether I was going to apply California law or Texas law or what because it would not make the impact on the outcome of the case.

On the rest of the bill, there was a lot of talk today, which interested me, about strict liability and what we really do. When you look at Jim's report, being the scholar Jim is, he has two caveats which I think are very important caveats in looking at his report.

One is it does not take into account settlements and, really, there is no way he can.

And secondly, it does not take into account the probability—I think it is more than a possibility. I think it is a probability based upon what I have seen—that the plaintiff's bar overreached itself in the height of the last decade or so and started to bring claims they would not bring before. And I think that is what may go into a lot of the change that Jim has found. He makes a note of that in his study.

So, I think it is kind of academic to talk about the standards of fault here because I can assure you is what a jury does every single time is try to find the person at fault. They are going to try to find that person at fault regardless of what you charge them. So, I do not think your fault concept is going to be taken out.

I do not get into this argument that my colleagues here are in over whether plaintiffs are favored or defendants are favored. What I want to see cut down is the waste of money. There is where I think our competitiveness may be hurt, that is spending money on transaction costs instead of actually getting to the merits of the case. And arguing, as I have in many cases, what law you are going to apply to the case is counterproductive.

And that is what has caused the alarm in Connecticut. In my own state, every single aspect of litigation, whether it is plaintiff, defense, manufacturers or insurance, all are opposed to our bills that the legislature passed because they are such because they are such defective bills. They are a product of compromise.

Senator **BRYAN**. Is it your own view that at least a couple of the items that you mentioned—the statute of repose, the uniform standard for the finding of punitive damages—you would be substantial help in perhaps reducing the transaction costs?

Mr. **EGINTON**. I do not agree with those who have said today—and I have not heard too much of this said, but there was a little bit said today about the fact that you might have 12 jurisdictions added to the 55. The 12 circuit courts of appeal will not have the problem with this bill any more than we would as district court judges applying it because it does set the standards that we would apply.

And I do not think there is a lot of room in this bill for interpretation as there was in S. 44. I think that was one of the points that Jim was making that this bill is a fairly modest bill compared to that.

Senator **BRYAN**. Judge, one other question. What is your view of the part of the bill that deals with the offer of judgment, the alternative dispute resolution in the early sections of the bill? The argument has been made that those provisions are unworkable from a mechanical point of view. Assuming their validity in correcting the perceived problems that we deal with, your comments as a trial judge.

Mr. **EGINTON**. All right. They need some tuning. One of the comments that was made by Professor Mann that I think is a very good comment—I think he has presented the issue very, very well. You will get lack of uniformity as you go to the state ADR plans. A lot of states do not have any ADR plans.

Secondly, your time span may be too short to permit people to prepare for an ADR.

But I think you are on the right track. In other words, anything you can do to relieve our congestion, I am delighted with. So, the more ADR you have, the happier I am.

Senator **BRYAN**. I appreciate that. If you would be so kind, as I would ask the other members of the panel, to respond to any questions that we might have in writing. I am going to specifically ask a question in terms of the workability, in terms of the time constraints and the process that is incorporated in that.

Professor Mann, if I might ask you some questions. You are one that can tell us a little bit about the EEC. And I gathered from your comment that the information that I was asking one of the previous witnesses about seems to be accurate. That is, this uniform drift, with EC '92 and the directive that may really enhance the ability of plaintiffs to recover as an attempt, in terms of social policy, to shift the burden from the taxpayers respectively of those countries to the manufacturer who, in effect, sets in motion the product that causes the loss or damage. It is a conscious, philosophical burden-shifting, if I understood your testimony correctly. Please correct me if I am wrong and enlighten me further if I am on the right track.

Mr. MANN. Mr. Chairman, I think you properly caught the drift of my testimony. That is exactly what I was trying to communicate.

Senator BRYAN. You talked about a dual system. You almost seemed to suggest, Professor Mann, that in effect these are not in derogation, which I believe was your language, of the existing organic body of law that exists in each of these countries. They will be a supplement or an adjunct to that.

To the extent that they purport to be in conflict with the existing codes that are in existence, do the prior codes take precedence over the subsequent EC directive? How does that interplay work?

Mr. MANN. First of all, Mr. Chairman, they are parallel bodies of law so that a plaintiff, let us say, in the Netherlands can file a products liability claim under section 1406 or 1407 of the civil code. That section really establishes a negligence standard. And they have some very unique kind of evidence doctrine. It is very close to ours, but I will skip that.

Senator BRYAN. Sure.

Mr. MANN. At the same time, that same plaintiff can make an allegation under the new directive. And so, we have alternative pleading here in most states in the United States. Likewise, they will be able to pursue both theories.

Senator BRYAN. So, at least in language which some of us that drifted through the legal process a few years might understand, you are indicating that they might argue, in effect, in a complaint or a declaration or whatever they use in Europe, a cause of action under the EC directive, and a cause of action under the existing code in the Netherlands or the Federal Republic or whatever. In theory a judge or a jury may be able to find in favor of a plaintiff on either of the alternative or supplemental theories that is advanced, if I understand.

Mr. MANN. That is correct. It would always be a judge.

And some of the countries did not have developed law with respect to products. This brings them up to speed with some of the more advanced countries. But the Netherlands is one of the more advanced I think, and in the Netherlands you would have both theories pled.

Senator BRYAN. With the kinds of commercial transactions that are occurring with increased frequency in Europe, is there something akin to this complex body of law that Judge Eginton was telling us about, this conflict of laws? Can plaintiffs engage in a little bit of the forum shopping that we have heard discussed, or is that precluded under the codes in Europe?

Mr. MANN. It is kind of in the middle, that is to say, they have the Brussels Convention and the Luxembourg Convention which establish not only where a case can be filed based on first domicile of the defendant, where the tort or whatever occurred, but also what law should apply. So, there may be two or three choices, but certainly not eight, nine or multiples of that. So, it is reduced, but there is some choice, some ability to select.

Senator **BRYAN**. If one were looking in a crystal ball—and I am sure the data may or may not be in place yet to support this—is it fair to conclude or to reason that the number of actions filed on behalf of plaintiffs will probably increase in Europe, and if they do, the probability of recovery by plaintiffs is likely to increase by some incremental amount without trying to quantify a number?

Mr. **MANN**. That is what most of the scholars and judges seem to anticipate, but in a kind of measured way, but certainly an increase. I surveyed a few insurers while I was there, and back in 1986 they indicated, well, only a modest increase. Now they are talking perhaps a 2 to 3 percent increase. They expect some costs associated with it.

Senator **BRYAN**. Thank you very much.

Mr. Fark, I confess I do not know the size of your business. And I see I am going to get a roll call vote in just a few minutes, but let me if I can take a few minutes. Tell us the size of your business, if you will, sir, by something that we can relate to. I do not want any proprietary information that you regard as confidential, but give me some indication of how large your business is.

Mr. **FARK**. We have 850 employees, two locations. The main location is in Minster, Ohio, and we have a small subsidiary plant in Beaufort, South Carolina.

Senator **BRYAN**. I call yours a small business without being pejorative at all, but descriptive as best I can, and I think you would probably be comfortable with that description. Small but important.

Mr. **FARK**. Yes.

Senator **BRYAN**. All right. Did you have problems during the—well, I am thinking about the 1986-87 time frame—to get insurance. Was that a real problem for you?

Mr. **FARK**. We do not have insurance.

Senator **BRYAN**. You don't have insurance.

Mr. **FARK**. We are self-insured. We began to have problems getting insurance back in the mid-1970s. We have been fighting this problem for a long, long time.

Senator **BRYAN**. With you, sir, is it a question of availability or cost, or is it both?

Mr. **FARK**. Primarily price.

Senator **BRYAN**. Primarily price.

Mr. **FARK**. Yes.

Senator **BRYAN**. In your state where you do business, is there any effort being undertaken to make insurance more available at lesser cost?

Mr. **FARK**. Well, if I may speak for the NMTBA for just a moment, I think our survey also indicated—and I think it is in our written testimony—that some 25 percent of our members last year could not buy insurance for one reason or another.

But the NMTBA has worked very hard over the years, for and in support of the Risk Retention Act, and the association has promoted an organization of a risk retention group. That was kicked off the first of the year. I cannot tell you the exact number of people that are in it now, but a substantial number, enough to capitalize it, and have an ongoing insurance operation.

So, in my own company's viewpoint, we would go into the insurance market at certain times. In fact, when I say we have not had any, we have been in the market on a couple of occasions. When there is a soft market and we think the price is right, we will go in. We have only had a couple of chances to do that in the last 15 years.

We are in the metal forming business, and we probably have more claims than most machine tool builders. Press builders normally do. So, therefore, insurance companies want to look at the worst situation and I do not blame them. I would too.

But by the time we are all finished dealing with those people, we would only be exchanging dollars and paying them a fee for doing that. The umbrella insurance or excess insurance market is not to be had over products.

Senator **Bryan**. Is the rating system from an insurance perspective, as you view it, fair in terms of what you are being charged? Is that something that you are satisfied—high as it is and beyond your reach oftentimes—that nevertheless it is a fair quote?

We have had a lot of commentary over the years in my state as to how those numbers are developed and whether that is really a fair system for pricing insurance. I do not know what your assessment is.

Mr. **Fark**. We really are not familiar with whatever their factors and formulas would be. We only are familiar with the outcome.

Senator **Bryan**. Mr. Fark, I would ask you, as I have the other witnesses, if there are additional questions that members of the panel have, if we might get a response from you in a reasonable period of time.

Professor Eisenberg, I would not want you to feel that your trip here is a waste. If there is something that you would care to add or supplement or disagree with, we would tender the floor to you.

Mr. **Eisenberg**. Thank you, sir.

I am a novice on products liability. My major field has been studying the legal system and hence the charts.

But just in sitting and listening and reading S. 1400 quickly, maybe the two major themes are competitiveness and transaction costs. As I read S. 1400, it keeps contingent fees, it keeps punitive damages.

If you enact this bill and do a study of transaction costs 10 years from now, unless something else changes, you will not have reduced them in the slightest. Maybe you will eliminate occasionally the issue of a conflict of laws ruling which must be just a tiny fraction of the overall transaction costs. I do not see it making the slightest bit of difference in the long run there.

On predictability, which is one of the other major themes, defendants in these cases can have predictability. I do not think they just want predictability. They want predictability with an outcome in a particular direction.

Enactment of this bill now, if you are serious about worrying about the EEC in 1992, is going to introduce, say, a generation or at least 10 years of increased uncertainty in the products liability system. That may put America at a permanent competitive disadvantage because there is going to be more unpredictability tomorrow than there is today until this settles down and, as the Chief Judge of Maine stated, this is not going to settle down quickly.

The cases that this bill deals with are going to be tried in state courts. There is no Federal jurisdiction. There are hundreds of thousands of products liability cases, one or two of which a year might filter their way up to the Supreme Court to resolve differences in interpreting the Federal law. So, I think you are going to have a decade or so of incredible variety in interpreting this law and, as against a baseline of today, greater unpredictability.

Senator BRYAN. I guess you are probably saying that this bill does not have the virtue that the advocates and proponents claim and perhaps not the vice that its critics suggest as well.

Mr. EISENBERG. I am not even sure from the point of view of—it would take a deeper study. To the extent it introduces uniformity and preempts state law, it seems to me this bill runs the risk from the proponents' point of view of increasing their liability in those states that have recently enacted tort reform. I am not even sure it is in their self- interest in some of those states.

I would also add another major theme is variability across jurisdictions in the United States. We do have the data available—it has not been sort of run yet—to test that, that is controlling for the kinds of injuries in a case, the type of product that was at issue in the case. To what extent do results differ in Washington from Arizona from Idaho from New York? It seems to me that is a pretty important question, and perhaps one ought to look into that in connection with perhaps future hearings or follow-up.

Senator BRYAN. Professor Eisenberg, we thank you, Mr. Fark, Professor Henderson, Judge Eginton, Professor Mann, for not only your testimony, but your patience. I am sure you probably thought that this hearing was going to conclude the same day it began. I think we have been able to achieve that objective. We thank you.

This subcommittee hearing will stand in recess.

[Whereupon, at 1:41 p.m., the subcommittee was adjourned.]

PRODUCT LIABILITY REFORM ACT

THURSDAY, APRIL 5, 1990

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:35 a.m., in room SR-253, Russell Senate Office Building, Hon. Richard Bryan (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR BRYAN

Senator **BRYAN**. Good morning, ladies and gentlemen. Welcome to the second hearing on S. 1400, the Product Liability Reform Act.

Today's hearing will focus on the competitiveness of American business. We will consider it in the context of S. 1400, because the advocates of this legislation argue that this bill is necessary to maintain America's competitiveness in the international marketplace.

Indeed, evidence points to an alarming decline in America's manufacturing base in the past 20 years. Data obtained from the Department of Commerce show that between 1970 and 1987 the U.S. market share, even in products developed from U.S.-invented technology, has plummeted dramatically.

For example, in 1970 the U.S. market share of color televisions was 99 percent. In 1987 our market share had declined to 10 percent. For phonographs the story is even more graphic. We had 90 percent of the market in 1970. In 1987 we had only 1 percent, and for machine tool builders, an industry that I know is important to many of you here today, our market share dropped from 99 percent in 1970 to some 35 percent in 1987.

It is clear that we have a problem. The issue, then, that we address this morning is whether Federal product liability legislation, and particularly S. 1400, is part of the solution.

Supporters of S. 1400 contend it will help to level the playing field between U.S. business and foreign competitors, because liability costs in other countries are less than they are here. They also suggest that such legislation will improve the uniformity and predictability of liability law, and finally they claim that the current system stifles innovation and keeps new products from reaching their place in the marketplace.

Opponents of S. 1400 counter that American products can be most effective and competitive if they maintain a reputation for safety and high quality, and that the current product liability system assists in that effort. They also argue that product liability could not have a significant impact on competitiveness because many other factors are responsible for the problem, and further that liability costs are less than 1 percent of the price of a product or the annual revenues of business. Finally, they contend that S. 1400 will not reduce business insurance costs and so will have no effect on the cost of doing business or the ability to compete.

Our witnesses are extraordinarily well-qualified this morning to articulate these positions. We will begin with the Secretary of Commerce, recently returned from Japan, who will share with us some valuable insights. In addition, the Office of Technology Assessment has only recently completed an in-depth study of the competitiveness of manufacturing. Dr. Julie Fox Gorte will share the results of that study. We will also hear from experts in the academic, small business and insurance communities, all of whom bring an important perspective in this issue.

I look forward to hearing this testimony, and appreciate the time and effort of each witness here today. In particular I would like to compliment the proponents who submitted their testimony promptly and gave each of us an opportunity to read that testimony prior to the hearing this morning.

I will now yield to the Chairman of the full Committee, Senator Hollings, for an opening statement.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Thank you, Mr. Chairman, and I appreciate the leadership and the attention and hard work you have given this particular subject.

I cannot believe I am attending another product liability hearing. Since the supporters of Federal product liability law keep changing the reasons they say we need this law, we need to keep having hearings to find out what they are talking about. And so far, they have not had any objective information to back up their claims that this law will fix what is broken.

In fact, in the hearing we held about a month ago on the effectiveness of the current system, we learned that, as each new item of data comes in, it confirms that the system is working fine. The General Accounting Office [GAO] told us that the system seems to be properly compensating victims in accordance with the nature of their injury. Professors Henderson and Eisenberg told us that court decisions are increasingly favoring defendants, not plaintiffs.

Today we will hear about the competitiveness of American business, an issue that is near and dear to all of our hearts. I think every Member of Congress is deeply concerned about American business and its competitive position in the world. For my part, in the 1988 Trade Act, I was able to secure passage of several provisions to get the Government on the side of business by promoting the transfer of new technologies, in particular with the establishment of regional centers for the transfer of manufacturing technology. This type of program will provide small business with the benefits of new technologies, and is the type of government effort that can help all our businesses compete.

However, I do not see how changes in the product liability law at the Federal level can help with this problem. I have yet to see any evidence that product liability costs are a significant part of businesses' expenses. Instead, the conference board and GAO both found that product liability costs are less than 1 percent of the final price of products, and less than 1 percent of businesses' annual revenues.

In addition, I have yet to see any evidence that bills like S. 1400 will reduce businesses' costs in any way. And if this kind of legislation cannot reduce costs, I do not know how it can help business. In this regard, I am pleased that testimony will be presented about insurance and its relationship to business' costs, for I have long felt that insurance unavailability and affordability issues must be a part of this debate.

Maybe what businesses are looking for is a victory in the legislative process that will make them feel good. But we should not overturn the current system just because someone thinks they will feel better if we do. Responsible legislation does not proceed based on unsubstantiated fears that businesses may have about being sued. Responsible legislation must be based on objective information that the action taken will address the problem. If there is such information about competitiveness and product liability, I would like to hear it, but I have not hear it yet.

I look forward to the discussion today with our witnesses on these issues.

Senator BRYAN. The ranking member of the full Committee, Senator Danforth, and a cosponsor of this legislation, joins us.

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much. This is not a new issue for this Committee. Back, I think in 1985, we were having hearings. In 1986 or so we marked up a product liability bill. We took it to the floor of the Senate. So it has been around. We have had countless days of hearings, and my own view is that the time has come to legislate. I really think we are prepared to do that, and my hope would be that we could get a very early mark-up on this legislation and take it to the floor of the Senate.

Senator BRYAN. Thank you very much, Senator Danforth. I believe Senator McCain joined us first this morning. I will defer to him, another co-sponsor of the legislation.

OPENING STATEMENT BY SENATOR McCAIN

Senator McCAIN. Thank you, Mr. Chairman, and I welcome Secretary Mosbacher especially, along with the other witnesses. Secretary Mosbacher, we consider your testimony very important this morning and we are very appreciative of the outstanding job that you are doing.

As Senator Danforth said, I think the time has come, Mr. Chairman. I have been involved, along with Senator Kassebaum and others, in aircraft product liability reform efforts which have been proceeding parallel and with about as much success.

The fact is that in general aviation in America today there are 1,143 aircraft that will be built this year. In 1979 there were 17,000 commercial aircraft. Today, we make fewer airplanes in a year than we averaged per month in the 1970's, and this is business jets and there is no piston engine production aircraft in America today.

We are seeing, if not the disappearance, the extreme diminution of an entire industry in America, and there is no one that I know of that does not lay the primary responsibility for this disappearance of general aviation in America to the issue of product liability.

The time has come for reform, and I state again, Mr. Chairman, my extreme disappointment in the American Trial Lawyers Association, who stated before the Aviation Subcommittee at a hearing several months ago that they refuse to sit down and talk about the issue to try and reach some agreements. Their spokesperson said to me and Senator Ford that they absolutely, adamantly refuse to even discuss the issue.

Mr. Chairman, that is not the way we should conduct business in this Nation when there is a problem. We hope that they will change their position and sit down with us and the aircraft manufacturers and others and try to reach some agreement so that we can restore general aviation in America to the robust condition which it once enjoyed, and more importantly give young Americans an opportunity to learn how to fly aircraft.

Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Senator McCain, and the prime sponsor of this legislation, Senator Kasten.

OPENING STATEMENT BY SENATOR KASTEN

Senator **Kasten**. Mr. Chairman, thank you. Today we are holding our second hearing on S. 1400. It was introduced in July 1989 and we now have 29 Senators signed on as cosponsors, and the cosponsor list continues to grow.

Not only are there damaging effects here at home, but America's manufacturers are compromised in their ability to compete internationally by the effects of U.S. product liability laws. American manufacturers and sellers have to deal with product liability costs that are 20 to 50 times higher than those of our foreign competitors, hamstringing American business just when we stand poised to enter a new era of competition for the emerging markets of East and Western Europe.

The necessity of action and the administration's commitment to assist American businesses and workers are evidenced by the appearance here today of Commerce Secretary Mosbacher. The President's State of the Union Message called for product liability reform. The Council on Competitiveness made it its number one issue, and the Secretary's testimony here today and his personal appearance confirms the need for quick action and reasonable reform. I believe that the majority of this Committee and the majority of the Congress agree with Secretary Mosbacher and me and others that the time for action is now.

American workers and consumers suffer from an unfair system that sees more money going to lawyers than to injured parties in this area of the law. No foreign manufacturers have to face at home the stringent liability laws that we have here. We can and we must enact the reforms proposed by this legislation to rectify certain aspects of this unfair, and most importantly, unproductive system.

We will hear from some witnesses today opposing the legislation, that competitiveness is some new concept in this debate that was cooked up because we have moved from such concerns as the cost and availability of insurance.

I think anyone who recalls the debates from the beginning of our attempt to reform these laws about ten years ago should remember testimony from such parties as the National Machine Tool Builders Association, the American Textile Machinery Association, complaining about not only their domestic situation, but what was happening to them in the international markets as a result of American Product Liability laws that we have yet to reform.

The competitiveness issue was a major issue then in 1982 and 1983. It has simply become even more important as Europe 1992 comes together and we see Germany and we see Japan and Korea and Taiwan continuing to increase their industrial strength worldwide. So it is not a new concern. It is one facet of this problem that has had many damaging effects on our economy.

We are also going to be looking at some of the insurance ramifications of the product liability problem. It continues to be a significant problem both as to cost and availability for many companies and industries. We should address product liability reform in this period of relative calm. We do not see the crisis in insurance we have, but it still is a significant problem, and now we can address this in a period of relative calm with our bipartisan, moderate bill.

With respect to this aspect of the problem, I was sorry that Dennis Connelly, senior vice president of Johnson & Higgins, could not join us as intended. He copied members of the Committee with his letter, Mr. Chairman, to you of March 30 conveying his support for the legislation, and he is one that has been intimately involved with the insurance side of this.

I would just like to point out two excerpts of his letter and ask that the entire letter be made a part of the record at this point. "The kinds of liability," and I quote, "which would be affected by this legislation are most important to our client base."

> As the broker which handles as many, or more, self-insurance arrangements as any other broker, we feel the legislation would have an impact in both the insurance market and in the way in which clients price and handle their retained liabilities.
>
> This, in turn, will affect their competitive position worldwide and also their willingness to innovate. It is true even though this legislation is not a broad-brush revision of the product liability system, but rather a targeted approach,

And later,

> We believe that for some of our clients in certain areas of activity the bill before you would reduce uncertainty. We would use this to improve clients overall handling of risk. It is notable that most of the legislation is directed in ways which will remove delay and reduce transaction costs.

Mr. Chairman, I look forward to working with you in moving first of all to wrap up these hearings and then moving quickly to mark-up at the earliest possible date, and I thank Secretary Mosbacher not only for his tremendous job as Secretary of Commerce but also for coming here today to testify on this product liability legislation.

Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Senator Kasten. I will yield to Senator Hollings.

The **Chairman**. Mr. Chairman, I do not want to delay the Secretary. The distinguished Senator from Wisconsin has talked about the money going to the lawyers and not to the injured parties. I just cannot see our distinguished friend really interested in the injured parties.

If you want to know about the money going to the lawyers, the record is replete that in cases where there are victorious, yes, a third of the award goes to the plaintiff's lawyers. But 42 percent of defendant's costs go to the defendant's lawyers and the insurance company lawyers that are the defendant's representatives are habitually paid regularly by the hour.

I wish I could show my colleagues up here at this table some old legal files—I am turning them over to the University of South Carolina. I would like to show them many a case that we represented in which we were not successful, and in which we spent a lot of time and we spent a lot of money. Of course it did not cost that plaintiff or injured party anything, but we were willing to take that case and try our best, and while we did not succeed it cost the plaintiff nothing.

The plaintiffs have the burden of proof. They have got to win all 12 votes by a preponderance of the evidence, and it is the old jury system that has been tried and true the country over. So let us not go down the primrose path and wave the flag that this is about the lawyers.

Then my colleague from Arizona says that he is very saddened that the trial lawyers did not sit down and negotiate. The trial lawyers could sit down or stand up or jump out or go to, it does not make any difference to me.

If you want to know the interested parties, why not the American Bar Association, which has opposed this bill. Why have they not sat down? Why has not the Consumer Federation of America, that opposes this bill? Why do we not get them to sit down? Why do we not get the Association of Supreme Court Justices of the several States that have come regularly to testify against this bill? Why do we not get them to sit down?

Why do we not get the Attorney Generals of the United States of America? Why do we not get them to sit down? Why do we not get the legislators of the States who have come regularly to testify against this bill, for them to come and sit down?

Now, the appearance is given here that this is a trial lawyer crowd, greedy trying to get more money. They are not going to get a red cent unless that jury gives it to them, I can tell you that, and they are going to have to prove it by the preponderance of evidence, and they have got to take many a case up on appeal, and you can take all the product liability cases in the last ten years does not equal the verdict that Pennzoil got against Texaco of $12 billion.

I can go down the contract cases in industry, and I want to hear the Secretary of Commerce talk about industry and that cost and how we are going to get these boards of directors to stop suing each other. They are the ones that are running up the cost and terrifying America with these takeovers and mergers bankrupting industry after industry. I think that is a much, much greater problem than the regular operation of product liability in the States.

It is very interesting to see Senators when they do not win their cases. They continue to get paid.

Senator DANFORTH. Mr. Chairman, I wonder if Senator Hollings would yield.

The CHAIRMAN. Yes, I would be delighted to yield.

Senator DANFORTH. Mr. Chairman, did I hear you say that the plaintiffs' lawyers get 33 percent and defense lawyers get 42 percent?

The CHAIRMAN. Forty-two cents on the dollar. That is in your committee report.

Senator DANFORTH. So that is a grand total of 75 percent of recoveries going to lawyers? Surely it cannot be that high.

The CHAIRMAN. It is amazing, is it not?

Senator DANFORTH. In medical malpractice I am told that 28 cents out of every dollar goes to the patients, but this would mean that only 25 cents out of every dollar would go to the plaintiffs, successful plaintiffs. 75 percent goes to lawyers?

The CHAIRMAN. No, not the entire thing. It goes to the defense cost and everything else. I can go right over any verdict that is had, but according to the calculations of the Insurance Services Office, of every dollar paid to claimants, the insured is paid an average of 42 cents in defense cost, while of every dollar awarded to a plaintiff, the plaintiff pays an average contingency fee of 33 cents.

Senator DANFORTH. So that is 33 cents for the plaintiff's lawyer and 42 cents for the defense lawyer. Gee, that is high.

The CHAIRMAN. I say it is way better than religion, Pastor.

Senator DANFORTH. That depends on who you are talking to.

Well, I want to tell the Chairman I agree that I do not think we need to be sitting down anymore. I think we need to be marking up.

The CHAIRMAN. I think we need to listen.

Senator BRYAN. I have given as much time as possible to my colleagues, but we do have the Secretary here who is going to enlighten us all on these issues.

Senator McCain, let me just yield.

Senator MCCAIN. Let me respond very briefly to our distinguished Chairman. The reason why I mentioned the trial lawyers' failure to sit down is because all of those other entities that I have discussed that the Chairman mentioned are willing to sit down, Mr. Chairman. The only ones that were not are the American Trial Lawyers Association; at least, that has been my personal communications with all of those entities that you described.

So yes, they should sit down, and they will sit down. There is only one group that will not.

Senator BRYAN. Thank you very much, Senator McCain.

This morning, on behalf of the committee, it is my pleasure to welcome the Secretary of Commerce, Mr. Mosbacher, here. Mr. Secretary, I will tell you that your absence was duly noted in the first hearing and the reasons for it explained. Mr. Willkie did a fine job in carrying the banner for the Department.

We are pleased to hear from you this morning, and after you have heard our primary observations we are anxious to gain some insight from you. So let me now defer to you, sir, and welcome you again to the committee.

STATEMENT OF HON. ROBERT MOSBACHER, SECRETARY, DEPARTMENT OF COMMERCE

Secretary **Mosbacher**. Thank you, Mr. Chairman and Members of the Committee. It is a pleasure to be here, although I must say I enjoyed the first part more than I will probably enjoy the second part.

I am here to underscore this administration's commitment to the Federal Product Liability Reform. To put it very briefly, we support S. 1400. We Americans enjoy the most productive economy on earth, but let us not kid ourselves. We are fighting hard to maintain, in some cases to regain, our competitive edge, and if we do not continue to improve we are going to lose it.

American businesses must offer the best quality products and services at competitive prices in order to succeed in the increasingly tougher international marketplace. As market forces spread throughout the world and the shackles on private enterprise in these emerging market-oriented democracies are lifted, competition is going to get even tougher. We as a Nation must do all we can to eliminate unnecessary obstacles so U.S. companies can compete worldwide.

Product liability reform, changes in our antitrust laws, strong trade promotion efforts, more rapid commercialization of our new R&D, streamlining our export controls, and a reduction in the capital gains tax are all essential components of our competitiveness strategy.

In my opinion, we have made some real progress. Manufacturing technology centers, advance technology programs and increased funding for research and development are essential components; but they are not enough. They are only a part of the overall effort.

Then there is the product liability problem. Our current liability system of 50 different State laws generates unprecedented litigation. It inflates insurance costs and creates uncertainties for American businesses. Alternately, these costs are borne by the American consumer.

Between 1973 and 1988, product liability suits in Federal courts increased 1,000 percent. That is 10 times in these 15 years, 10 times the number of liability suits. In State courts the increase was between 300 and 500 percent. One estimate of the total cost of these suits is $80 billion per year. That is a sum equal to the combined profits of the Nation's 200 largest companies.

A lot of individual states have instituted some tort reform measures over the last three years, but there is an awful lot that still can and must be done. That is why product liability reform belongs squarely on the short list of necessary steps to U.S. competitiveness. Our competitiveness is at the top of my agenda and, most importantly, it is a top priority for our President, as you heard in his State of the Union Address.

The excess costliness of our product liability system unacceptably burdens our competitiveness. It results in unnecessarily high prices for American products. It causes useful products to be discontinued. It discourages introduction of new products and discourages new product R&D. In short, it undermines the competitiveness goal of bringing forth the best possible products at the lowest possible price.

It also, of course, costs American workers jobs. Just to cite one study from Texas, Baylor University economist Ray Perriman reported in January 1989 that the current liability system in Texas cost the state over $8 billion and 79,000 lost jobs the prior year. That is just one State; a big one, but just one.

You are undoubtedly familiar with the 1988 Conference Board Survey in which 42 percent of the CEO's who responded agreed that product liability was having a major negative impact on their companies, and over 88 percent if you add those with moderate effect.

Also, 70 percent of the small businesses said the same thing. 75 percent said they expected the future impact on the product liability system would grow in significance.

Talk is cheap. Let me tell you as a former businessman for over 40 years and as someone who sees great numbers of CEO's all the time, fears of uncertain product liability exposure are causing American executives to pull back products and to refrain from marketing some of their best and most innovative offerings. That is what S. 1400, the bill before you, is all about. It will encourage innovation and enhance competitiveness by adding a degree of uniformity, certainty and predictability that has been missing under the existing product liability regime of 50 different State laws.

The legal cost of product liability currently totals more than final payouts for compensation to the actual victims. I am just learning how much more here this morning.

It will reduce transaction costs by creating incentives for settlements and alternative dispute resolution procedures. This means more cases will be resolved speedily and a lot more fairly. As a result, all parties will benefit: consumers, workers, as well as businesses large and small.

S. 1400 is not a cure-all or a panacea for all competitiveness problems. Furthermore, it will not solve all the product liability problems. It is, however, a fair, balanced approach and a valuable step forward. I think, moreover, it is one very important piece of the competitiveness puzzle.

Gentlemen, time is of the essence. It is time to act on S. 1400 so we can move forward in our joint efforts, the efforts and the goals we share together of making America more competitive.

Thanks very much.

[The statement follows:]

STATEMENT OF

ROBERT A. MOSBACHER

SECRETARY OF COMMERCE

MR. CHAIRMAN, THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THIS COMMITTEE TO DISCUSS FEDERAL PRODUCT LIABILITY REFORM.

UNDER THE STEWARDSHIP OF PRESIDENT BUSH, THE U.S. ECONOMY CONTINUES ITS REMARKABLE EXPANSION. WE AMERICANS ENJOY THE LARGEST, STRONGEST, MOST PRODUCTIVE ECONOMY ON EARTH. BUT LET'S NOT KID OURSELVES EITHER, WE ARE FIGHTING MIGHTILY TO MAINTAIN OUR COMPETITIVE EDGE. AND IF WE DON'T EXERCISE CARE, WE WILL LOSE IT.

TO COMPETE EFFECTIVELY IN THE INCREASINGLY COMPETITIVE INTERNATIONAL MARKETPLACE, THE UNITED STATES MUST OFFER THE BEST PRODUCTS AND SERVICES AT THE LOWEST COST. THERE IS NO SINGLE SOLUTION TO MAKING THE UNITED STATES MORE COMPETITIVE. AMONG OTHER MATTERS, WE MUST FIGHT UNFAIR TRADE PRACTICES, ENSURE THAT OUR LABOR FORCE IS WELL-EDUCATED, MAINTAIN REASONABLE AND EFFECTIVE EXPORT CONTROLS, SPEED THE COMMERCIALIZATION OF NEW TECHNOLOGIES, AND REMOVE OR REFORM LEGAL BARRIERS THAT DIMINISH U.S. BUSINESSES' ABILITY TO COMPETE. IN THIS LATTER CATEGORY, THE EXISTING PRODUCT LIABILITY SYSTEM IS ONE OF THE MOST SERIOUS SUCH BARRIERS.

FOR THESE REASONS, THE ADMINISTRATION STRONGLY SUPPORTS THE CHANGES MADE TO OUR PRODUCT LIABILITY SYSTEM BY S. 1400. IN ADDRESSING THE NEED FOR PRODUCT LIABILITY REFORM, PRESIDENT BUSH

HAS SAID, "A LEGISLATIVE PRIORITY OF OUR ADMINISTRATION WILL BE THE REFORM OF OUR COSTLY PRODUCT LIABILITY LAWS. THE BURDEN OF OUR PRESENT PRODUCT LIABILITY SYSTEM IS EXCESSIVE AND ADVERSELY AFFECTS OUR ABILITY TO COMPETE ABROAD."

IN ENDORSING S. 1400, THE ADMINISTRATION BELIEVES THAT IT IS A MODERATE, REASONABLE AND WELL-BALANCED PACKAGE OF REFORM MEASURES. THE BILL SHOULD ENCOURAGE U.S. BUSINESS INNOVATION AND IMPROVE U.S. INTERNATIONAL COMPETITIVENESS. AT THE SAME TIME, IT WILL PRESERVE ESSENTIAL PROTECTIONS FOR AMERICAN CONSUMERS.
S. 1400 WILL IMPROVE THE COMPETITIVENESS OF THE UNITED STATES BY ADDING A DEGREE OF UNIFORMITY, CERTAINTY AND PREDICTABILITY THAT HAS BEEN MISSING UNDER THE EXISTING PRODUCT LIABILITY SYSTEM. FEDERAL RULES THAT ARE CLEAR AND PREDICTABLE WILL BENEFIT AMERICAN MANUFACTURERS AND CONSUMERS.

THE BIPARTISAN EFFORT THAT SURROUNDS THIS BILL SUGGESTS THAT SIGNIFICANT FEDERAL PRODUCT LIABILITY REFORM IS POSSIBLE. THE ADMINISTRATION LOOKS FORWARD TO WORKING WITH YOU TO MAKE FEDERAL REFORM OF THE PRODUCT LIABILITY SYSTEM A REALITY IN THIS CONGRESS.

SOME PEOPLE HAVE THE MISCONCEPTION THAT THE COSTS OF OUR PRODUCT LIABILITY SYSTEM ARE BORNE BY CORPORATIONS AND THEIR SHARE-

HOLDERS, WHO ARE BELIEVED TO HAVE SUCH DEEP POCKETS THAT THEY CAN AFFORD TO PAY FOR ALMOST ANY DAMAGES AND RELATED COSTS THAT ARE SUSTAINED. THIS IS NOT CONSISTENT WITH ECONOMIC REALITY. OUR PRODUCT LIABILITY SYSTEM IS FAR MORE COSTLY THAN THE PRODUCT LIABILITY SYSTEMS OF OTHER COUNTRIES. THE EXCESSIVE COSTS OF OUR PRODUCT LIABILITY SYSTEM RESULT IN UNNECESSARILY HIGH PRICES FOR U.S. PRODUCTS. THIS IS YET ONE MORE COST OF DOING BUSINESS IN AMERICA THAT DOES NOT NECESSARILY COMPARE FAVORABLY WITH COSTS IN OTHER COUNTRIES. THIS MAKES AMERICAN PRODUCTS LESS ATTRACTIVE IN BOTH DOMESTIC AND FOREIGN MARKETS; A SITUATION THAT GROWS LESS TOLERABLE GIVEN THE EVER-INCREASING IMPORTANCE TO THE AMERICAN ECONOMY OF GLOBAL MARKETS AND INTERNATIONAL COMPETITION.

AS THE ADMINISTRATION HAS STATED IN RECENT TESTIMONY BEFORE THIS COMMITTEE, WE ARE NOT SUGGESTING THAT THE UNITED STATES SHOULD TRY TO IMITATE THE PRODUCT LIABILITY SYSTEMS OF OTHER COUNTRIES. OUR SYSTEM IS BASED ON CONCEPTS OF FAIRNESS AND DUE PROCESS THAT MUST BE PRESERVED. NOR WILL CHANGES IN OUR SYSTEM NECESSARILY DRIVE DOWN COSTS AS LOW AS THOSE IN FOREIGN SYSTEMS. BUT NOW MORE THAN EVER, IN LIGHT OF INCREASING CONCERNS ABOUT INTERNATIONAL ECONOMIC COMPETITION, WE SHOULD BE WILLING TO UNDERTAKE MODEST, APPROPRIATE, AND REASONABLE PRODUCT LIABILITY REFORMS. IN OUR VIEW, S. 1400 MAKES THE MODEST, YET MEANINGFUL, CHANGES TO THE SYSTEM THAT MERIT YOUR SUPPORT.

IN A 1988 CONFERENCE BOARD SURVEY OF CEOs FROM BOTH LARGE AND SMALL BUSINESSES, 40% OF THOSE RESPONDING AGREED THAT PRODUCT LIABILITY WAS HAVING A MAJOR IMPACT ON THEIR COMPANIES. IT INFLUENCED HOW THEY PLANNED AND HOW THEY DID BUSINESS. IT AFFECTED HOW THEY SPENT HUGE AMOUNTS OF THEIR TIME. RATIONAL BUSINESS PLANNING IS SERIOUSLY AFFECTED BY THE UNCERTAINTY OF THE SYSTEM. JUST AS ALARMING, 75% OF THE CEOs EXPECT THAT THE FUTURE IMPACT OF THE PRODUCT LIABILITY SYSTEM ON U.S. COMPETITIVENESS WILL GROW IN SIGNIFICANCE.

THE COSTS OF THE PRODUCT LIABILITY SYSTEM THAT THE CEOs SPOKE OF ARE BOTH DIRECT AND INDIRECT. THE DIRECT COSTS ARE EITHER ABSORBED BY THE BUSINESSES OR PASSED ON TO CONSUMERS IN THE FORM OF HIGHER PRICES. INCLUDED IN THE DIRECT COSTS OF THE PRODUCT LIABILITY SYSTEM ARE ENORMOUS TRANSACTION COSTS. IT IS DIFFICULT TO JUSTIFY EXTRAORDINARY TRANSACTION COSTS, PARTICULARLY WHEN THEY ARE BEING BORNE ULTIMATELY BY CONSUMERS WHO MUST PAY THROUGH HIGHER PRICES FOR GOODS AND SERVICES. THE INSTITUTE FOR CIVIL JUSTICE OF THE RAND CORPORATION CONCLUDED THAT IN 1985 TORT SYSTEM TRANSACTION COSTS TOTALLED $16 BILLION TO $19 BILLION. IN CONTRAST, ONLY $14 BILLION TO $16 BILLION WAS PAID IN NET COMPENSATION TO VICTIMS. SOMETHING IS TERRIBLY WRONG WITH A SYSTEM THAT REWARDS ATTORNEYS MORE THAN INJURED PARTIES. WE

WOULD EXPECT THAT THE EXPEDITED SETTLEMENT PROCEDURE CALLED FOR IN S. 1400 WOULD ASSIST IN ALLEVIATING SOME OF THESE TRANSACTION COSTS.

ON THE OTHER HAND, THE INDIRECT COSTS ARE DIFFICULT, AND IN MANY CASES IMPOSSIBLE, TO QUANTIFY AND THEY REFLECT A BUSINESS ATTITUDE ABOUT THE UNCERTAINTY OF THE PRODUCT LIABILITY SYSTEM. INDIRECT COSTS ARE REFLECTED IN USEFUL PRODUCTS BEING DISCONTINUED, DECISIONS NOT TO DEVELOP NEW PRODUCT LINES OR NOT TO CONTINUE PRODUCT RESEARCH, AND A FEAR TO INNOVATE.

IN THE CONFERENCE BOARD SURVEY, ALMOST HALF OF THE RESPONDING FIRMS REPORTED THAT THEY HAD DISCONTINUED PRODUCT LINES, 39% HAD DECIDED NOT TO INTRODUCE NEW PRODUCT LINES, AND 25% HAD DISCONTINUED PRODUCT RESEARCH. SOME MANUFACTURERS WILL SHUT DOWN OPERATIONS COMPLETELY. THIS LEADS TO A LOSS OF JOBS. MANY DECISIONS NOT TO MARKET SOCIALLY BENEFICIAL PRODUCTS THAT COULD IMPROVE THE HEALTH AND SAFETY OF AMERICAN CONSUMERS WERE BASED PRIMARILY ON THE FEAR OF POTENTIAL LIABILITY. FOR EXAMPLE, THERE ARE REPORTS OF PRODUCTS LIKE SUBSTITUTES FOR ASBESTOS, IMPROVED CHILD SAFETY SEATS, AND NEW VACCINES THAT COMPANIES ARE REFUSING TO MARKET BECAUSE OF THE FEAR OF LITIGATION. INDUSTRIES LIKE SPORTING GOODS, AEROSPACE, CHEMICALS AND PHARMACEUTICALS HAVE BEEN PARTICULARLY EXPOSED.

ANOTHER INDIRECT COST OF THE PRODUCT LIABILITY SYSTEM IS THE CHILLING EFFECT IT HAS ON RESEARCH AND DEVELOPMENT BY BOTH INDUSTRY AND THE ACADEMIC COMMUNITY. THERE ARE REPORTS OF UNIVERSITIES SHYING AWAY FROM LICENSING PATENTS TO SMALL MANUFACTURERS BECAUSE OF THEIR FEAR THAT, AS THE ORIGINATORS OF THE IDEA UPON WHICH A PRODUCT WAS MANUFACTURED, THEY WILL BECOME THE "DEEP POCKET" IF THERE IS LITIGATION INVOLVING THE PRODUCT. THIS TYPE OF SITUATION THREATENS OUR LEADERSHIP IN RESEARCH AND DEVELOPMENT AND CAN ONLY HARM OUR OVERALL COMPETITIVENESS.

AS I HAVE SAID, THIS IS NOT JUST A PROBLEM FOR BIG BUSINESS. SMALL BUSINESSES ARE PARTICULARLY AFFECTED BECAUSE THEY HAVE LESS LEVERAGE IN NEGOTIATING INSURANCE RATES AND ARE LESS ABLE TO SELF-INSURE OR UTILIZE OTHER INSURANCE ALTERNATIVES. A FEW YEARS AGO REPRESENTATIVES WHO PARTICIPATED IN A WHITE HOUSE CONFERENCE ON SMALL BUSINESS OVERWHELMINGLY DECIDED THAT THE NUMBER ONE ISSUE THAT NEEDED TO BE ADDRESSED WAS REFORM OF THE PRODUCT LIABILITY SYSTEM. OUR NATION RELIES HEAVILY ON THE CREATIVE GENIUS AND ENTREPRENEURIAL SPIRIT OF ITS SMALL BUSINESSES. WE CANNOT AFFORD TO STIFLE THAT SPIRIT BECAUSE OF THE FEAR OF POTENTIAL LITIGATION.

IN CONCLUSION, THE EXISTING PRODUCT LIABILITY SYSTEM IMPOSES EXCESSIVE COSTS AND CREATES UNWARRANTED UNCERTAINTY FOR AMERICAN COMPANIES. IT DENIES JOB OPPORTUNITIES TO AMERICAN WORKERS BY CONTRIBUTING TO PLANT CLOSINGS AND DETERRING BUSINESS EXPANSION. IT HARMS AMERICAN CONSUMERS BY RAISING PRICES, DIMINISHING THE QUALITY OF GOODS, AND DENYING ACCESS TO SOCIALLY BENEFICIAL PRODUCTS THAT MANUFACTURERS WILL REFUSE TO PRODUCE. IT HARMS BOTH PLAINTIFFS AND DEFENDANTS IN PRODUCT LIABILITY LITIGATION BY GENERATING ENORMOUS TRANSACTIONS COSTS THAT ARE GREATER THAN THE FUNDS ACTUALLY PAID OUT FOR INJURIES CAUSED BY DEFECTIVE PRODUCTS.

WE BELIEVE THAT THE TIME FOR FEDERAL PRODUCT LIABILITY REFORM IS NOW. MR. CHAIRMAN, WE IN THE ADMINISTRATION LOOK FORWARD TO WORKING WITH YOU AND ALL MEMBERS OF THIS COMMITTEE AND THE CONGRESS TO OBTAIN THE MODEST, BALANCED REFORMS THAT HAVE BEEN SUGGESTED IN S. 1400.

MR. CHAIRMAN, THAT CONCLUDES MY PREPARED REMARKS. I WILL BE PLEASED TO ANSWER ANY QUESTIONS THE COMMITTEE MAY HAVE.

Senator **Bryan**. Mr. Secretary, thank you very much for your testimony.

Before starting our round of questions, we have been joined by another co-sponsor of the legislation who has indicated he has an opening statement. Let me defer now to Senator Rockefeller.

OPENING STATEMENT BY SENATOR ROCKEFELLER

Senator **Rockefeller**. Mr. Chairman, I really appreciate that a lot, and I am embarrassed that the Secretary is being held up for a moment, but I would like to give it, and I will do so as quickly as possible because this is the competitive edge hearing. At our February hearing, which was not necessarily competitively based, so to speak, I spoke at some length about that issue, and I am really glad that we are going to be exploring it.

At the first hearing, I argued that product liability reform is one, as you have just said, Mr. Secretary, of the critical pieces to fill in the Nation's economic competitiveness puzzle. I recognize that product liability reform, by itself, will not dissolve the trade deficit. We are under no such illusions.

However, if we take steps as a nation to reduce the federal deficit, increase our savings rate, educate our children, devote more resources to R&D and everything that we know we ought to be doing, and add product liability reform to that mix, we will be on the road to meeting this serious economic challenge before us.

In the course of our discussions this morning, I would like to add one thought to this committee's deliberations. In many ways, the heart and soul of this debate may have come down to the question of individual responsibility and a willingness to accept more risk than we currently seem to be willing to accept as a nation.

I do not want to be misunderstood. I am not saying that manufacturers should be allowed to make unsafe products, or that employers should be permitted to operate unsafe work places. I would oppose any proposal or any amendment that would in any way have such an effect. And I certainly do not believe our product liability bill poses anything of that kind.

My point is that we should acknowledge the importance of taking risks and that growing concern that the balance is shifting, frankly, in our country, toward extinguishing that sense of risk. Our country was born as a nation of risk-takers. Some of our proudest and most important achievements in field after field are due to people willing to take risks, to make choices, and we must not lose sight of that, or ignore the signals that suggest that we should worry about the future.

We are fortunate today to have two outstanding witnesses who can describe the competitiveness ramifications of our product liability system better than I can.

These two gentlemen—Peter Huber and Malcolm Skolnick—have truly remarkable qualifications. Both are Ph.D. engineers/scientists by training, as well as possessing law degrees. They are not here representing any organization or interest group—be it the manufacturers, the trial lawyers, insurers, or the consumer. They are here because in the course of their different professional experiences they have become alarmed by a similar experience—the harm that they believe is being wreaked on scientific innovation in this country by our current product liability system.

I hope the members of this committee will listen closely to their testimony.

I am aware that this hearing today is also about insurance. I would caution this committee against getting side-tracked on this issue. The case for federal product liability reform should not depend upon whether changes in tort laws will lead to reduced insurance rates. Rather, the case for a federal product liability bill should turn on whether we have a system of fair and balanced product liability rules which provide guidance to the legal system and works to the best interest of all of the parties involved.

Mr. Chairman, I thank you for holding this hearing today and I urge this committee to get this bill to markup in an expeditious manner.

Senator BRYAN. Thank you very much, Senator Rockefeller.

Mr. Secretary, as I am sure you are aware, the Office of Technology Assessment has been exploring, as you and other members of your Department have, this issue of competitiveness. And they will testify later this morning that there are four primary factors that in their view create this competitive problem that we all recognize exists.

They say, number one, it is the high cost of capital. And number two, they say that American business has incurred tremendous expense in terms of defending itself from hostile takeovers.

And they also point to the leveraged buyouts which have been a part of the American corporate scene, particularly in the late 1980's. They talk about the quality of work force. And finally, they mention the lack of technology diffusion, as they call it.

And they cite, by way of comparison, that in Japan, the government has spent tens of billions of dollars in terms of developing technology centers and transferring that technology to small- and middle-business-size companies that are part of the supply network. And also, tens of billions of dollars in loan guarantees, particularly for the high-risk type of adventure that may have a high cost-to-risk benefit to the overall prospects of a technological breakthrough.

They do not mention as one of the primary factors the product liability system, although they do acknowledge it in a couple of fields, and particularly they cite the machine tools area.

Let me ask you what the Department is doing and what the Administration is doing with respect to these areas, if you agree that these are primary causes of the difficulties that we face, in terms of our declining ability to compete in the international marketplace?

Secretary MOSBACHER. Mr. Chairman, I agree that they are some of the primary causes, not all of them. And one on the short list, one of the primary causes is this product liability problem. The people involved in the day-to-day effort, the businessman, the small businessman, as well as the large one, finds this to be one of the primary causes.

And so I will be glad to try and answer what we are doing in the other areas. But I disagree that this should not go on the list. This is right up there with those you mentioned.

On the high cost of capital, we believe that lowering the capital gains tax rate and making the holding period longer will help that. We believe the Family Savings Plan, long term, will help. We believe bringing down the deficit, a lot of macroeconomics, will all be helpful.

In quality and education, this Department, as you know, has the Malcolm Baldrige Quality Award. And we are trying to, working through these quality centers, make the entire business community think more in terms of quality. And I really think it is catching on in an unprecedented way. So we are moving on that.

On the technology diffusion. Again, technology centers, the additional expenditures, over 16 percent added in R&D technology in the federal budget, and the fact that, to a greater degree than ever before, we are talking about commercializing technology.

The Competitiveness Council is working closely with the other departments on this. Commerce is heading a subcommittee to bring some of these R&D costs and efforts together. We have had joint meetings with the Secretary of Energy and a lot of private sector people on how to commercialize technology and R&D.

Senator Hollings and I went to a center that is doing just that. And there will be more of those coming onstream.

So that is what we are doing. If you want, I will talk a little about the leveraged buyout area. Frankly, I think that is probably a phenomenon that hopefully is self-correcting.

I will say, though, leveraged buyouts, in some ways, in some cases, can be helpful. There has been a lot of publicity about the bad ones. But they can make for more competitive and more efficient companies in some cases.

Senator **Bryan**. Do you think we need a legislative solution to the leveraged buyout problem and the hostile takeover?

I mean it seems to me that, from all the reports that you read in the financial journals, that American business oftentimes is preoccupied by an overriding concern that they want to defend and protect themselves against a hostile takeover. And rather than investing in R&D and looking at the long run, as our competitors in Japan and Western Europe seem to do so effectively, they are preoccupied by the defense of a prospective hostile takeover.

Has that sapped or innervated our ability to compete? And, if so, what should we do about it?

Secretary **Mosbacher**. Oh, I think it has had some very detrimental effects. But I think it was, at least in its largest form, a phenomenon of the 1980's.

I think the fact that financing is so much more difficult for these efforts today, because of some of the "junk bond" problems, that I really do believe it is self-correcting to a major degree. And I do not think legislation would be helpful. I think that the cure could be worse than the disease if we are not careful.

Senator **Bryan**. And you feel the same way about the hostile takeover defense, as well?

Secretary **Mosbacher**. I do not defend it. I just think it is decreasing to such a degree that it is not worth trying to put some damper on the good leveraged buyouts to try and fix the bad ones.

Senator **Bryan**. Mr Secretary, my time is running out, but later in this hearing this morning there will be testimony that indeed the insurance industry will testify that the cost of insurance premiums, the dollars that are paid by business for product liability will not decrease if this legislation is enacted.

Do you agree with that conclusion? If you do, how do we help American business, which I think is the interest of every member on this committee, whether they agree or disagree with this legislation or its provisions or the approach? It seems to me that the advocates have the burden of proof to say, look, if we pass it, it is going to do some good.

I think most of us recognize that there is a problem, or at least I do. And yet, the insurance industry says, look, if you pass S. 1400, it is not going to do any good. We are not going to be able to reduce the premiums that we charge the American business community.

Secretary MOSBACHER. Well, that is not the way I have viewed it. I sat on a very large, one of the top half a dozen insurance company boards for about 10 years. And I found that there is a delay, which seems perhaps to some people longer than it should be, while the insurance companies watch for the results that comes out of one of these things.

But I do not think there is any doubt, long term, if we have effective legislation that reduces the higher end of liabilities, that the insurance premiums will come down, just as they went up.

Senator BRYAN. Mr. Secretary, I thank you. My time is up.

I would defer now to the full Chairman, Mr. Hollings.

The CHAIRMAN. Mr. Secretary, I will get right to the point we mentioned a moment ago. Since you mentioned consumers, of course the Consumer Federation of America, the Consumer Union, the National Consumers League, and all the various consumers group have really commented in opposition to S. 1400.

And I find it intriguing that the administration has a schizophrenic policy. Here they have the Secretary of Commerce 3 weeks ago berating Japan to look out for the consumers, and then they have the Secretary 3 weeks later coming to the Congress and saying do not look out for the consumers.

Let us get to the consumers and the cost, since you have served on an insurance board. Insurers themselves will tell you rates are not going down. They will testify to that. If the rates are not going to diminish, how will that improve the competitiveness?

Secretary MOSBACHER. Well, I have gotten a different story from the insurance people I have talked to. They have said that they do not see them going down immediately or even very short term, because they are very cautious. And many of the insurance companies, and the one I sat on the board of, was owned by the policyholders, not by the stockholders. There were no stockholders.

But, long term, if the results warrant it, they will go down. And to the consumer, I say yes, we are watching out for the consumer, because the consumer, except the very tiny fraction who gets a real windfall out of punitive damages and other things, the other 99-plus percent of the consumers will benefit. Because, as they pay less costs or have less problems, they can charge less for the product.

So yes, our consumers will benefit.

The CHAIRMAN. Well, let us go from Japan to the European Economic Community, which seems to be in the forefront of our competition. Is the Secretary familiar with Council Directive 85-374 of the EEC?

I can refer—I see lawyer Willkie there, I am not trying to surprise anybody, but this is the Council directive relative to product liability.

It immediately defines any person who imports into the Community a product for sale, hire, leasing and so forth to be a producer. And where the producer cannot be identified, then each supplier shall be treated as a producer. And they say the producer shall be liable for damage caused by a defect in its product.

So the EEC is not only adopting product liability, but they go and say in Article V, where as a result of the provisions of this directive, two or more persons who are liable for the same damages shall be liable jointly and severally without prejudice to the provisions to all concerning the rights of contribution or recourse.

So they go for joint and several liability, strict liability, expand the scopes of possible defendants, and then, to make sure that the law of the province or the nation involved coming into this European Economic Community, under the Article XIII, that those laws are respected and not made uniform.

The directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or noncontractual liability or of a special liability system existing at the moment when this directive was ratified.

So here we find that we have safe products. In fact, this committee instituted the Consumer Product Safety Commission. The forerunner of that, you might well call it the American trial laws or whatever.

Because I can tell you now, that the Pinto crowd, where they could have spent $25 more on that gas tank, rather than $25 million in damages, they have become more careful in the design of products, and America is known for its success in product liability and is being emulated now by the EEC. But the Secretary of Commerce is coming to the Congress and saying let us go backwards.

Secretary MOSBACHER. Mr. Chairman, it is one-twentieth—not one-half, not one-quarter, but one-twentieth of their costs. They are one-twentieth of our cost in product liability. They have a long way to go to catch us.

But what we have, as you well know, sir, is we have joint and several liability, and it is in this bill for the economic aspects, and they are talking about liability for defects but they are not talking about punitive damages and noneconomic damages. We do not want to copy them and they can move towards us, and even after hopefully this bill or a bill like it is passed and they adopt this directive, they will still have a fraction of our cost. So to close the gap some makes sense.

The CHAIRMAN. Well, I see my time is almost up. Just as—since you have noted with your experience with the Insurance Board, we have approximately 30 Japanese industries, one just last month—Hitachi—at the end of the year, Nissan, the outstanding names of Japanese industry.

I have in my State and have helped attract from the very beginning, starting 30 years ago, more West German industry invested in the little State of South Carolina than in the other 49 combined.

We are proud of that, obviously. I have yet to hear any one of them say this is a terrible thing, or a costly thing, or an anticompetitive thing, your product liability here in South Carolina. They never mentioned it. I asked a couple of them.

This has been a political bent taken up by the Chamber of Commerce when they had no place to go. I used to work with them on labor law reform, then they went to Davis-Bacon, until they found out Bacon and Davis were Republicans, and Hoover who signed it was a Republican President, so they gave that up and now they are onto this one. I wish we could give them a new style to wear or something to do to exercise themselves to come out of these political platforms, because I can tell you we have real problems, and it is not product liability. The industry is tickled to death to come and invest and never mention the cost or the comparative burden, let us say, of our judicial system. They are rather proud of it.

Secretary **MOSBACHER**. Well, I think those companies are over here because this is the freest, biggest and best market in the world. If they have to take a little of the bitter with the sweet to get here they will do it, and we also have a tremendous labor force now that is less expensive to them than the West German.

The **CHAIRMAN**. The point is, they have never mentioned it being bitter. I have never heard it. I have been in the game at least 30 years, working on it.

Thank you.

Senator **BRYAN**. Thank you very much, Senator Hollings. We have been joined by the ranking member of this Subcommittee, who is also a cosponsor of the legislation, Senator Gorton.

OPENING STATEMENT BY SENATOR GORTON

Senator **GORTON**. Mr. Chairman, I do not want to take very much of your time at this point. I welcome the Secretary of Commerce here. I think this is a particularly important hearing, because it deals with the impact of our product liability law and the competitive status of American business and industry.

At this point in these proceedings it seems to me beyond reasonable argument that our product liability law does have an adverse impact on our national and international competitiveness, on the willingness of many of our companies to innovate and to come up with new and improved products, and for that matter with research and development.

When we spend many times more money on insurance premiums than we do on research and development in our industrial society we have our priorities somewhat skewed, and as a consequence I believe that we simply are in the process of creating value judgments.

Are we willing, in order to compensate people who are injured with or without the fault of a particular product, and are we willing to spend so much money on transactional costs in comparison with our Japanese and European competitors, to lose our lead in innovation and research and development and in new product development to balance these two things off?

My view is that there is a better balance, one which gets a larger amount of what are now transactional costs into the pockets of people who are in fact injured and one which is more predictable and less expensive to our businesses, and it is for that reason that at least in large part that I am a sponsor of this bill.

I regret that I was not here to hear Secretary Mosbacher's testimony, though I know its general outline, and so I will waive my opportunity to ask him any questions.

Senator BRYAN. Thank you very much, Senator Gorton. Senator McCain?

Senator McCAIN. Thank you, Mr. Chairman. Secretary Mosbacher, is it true that according to the information that the Department of Commerce has, that United States liability costs are 15 times higher than Japan's and 20 times higher than the European nations?

Secretary MOSBACHER. Yes, Senator, it is.

Senator McCAIN. That is bound to have some kind of impact—15 times higher than Japan's and 20 times higher than the European nations.

I was interested and intrigued that our distinguished Chairman, for whom I have the highest regard and affection, mentioned the European Economic Community and their guidelines. I wonder if our distinguished Chairman would be willing to adopt those same European Economic Community directives which implemented uniform product liability laws amongst its member countries?

Perhaps for the record you could provide us with the basic points of that directive, which I think is a very important step forward for the European Community. And unless we take some kind of action we could be in real trouble because it will further widen the competitiveness gap.

The CHAIRMAN. Will the gentleman yield? It just was not uniform. I just made that point. That is what I was making.

Senator McCAIN. Well, I guess that——

The CHAIRMAN. They are coming our way, and we are encouraging it.

Senator McCAIN. I hope that one of us may have some misinformation here, because my understanding is that the European Economic Community adopted a directive implementing uniform product liability laws amongst its member countries. Is that the information that my colleagues have also?

The CHAIRMAN. Article 13 says specifically it should respect the various provinces and states.

Senator BRYAN. Senator McCain, if I might, he may recall from our last hearing, there was testimony that was offered that indicates that the directive that has been referenced is in addition to the cause of action that exists in each of those countries.

So in effect, as I understand the testimony from the past hearing—perhaps the Secretary can correct me if I misunderstood that testimony—in effect, two causes of action are now provided in each of those countries, one based upon their law such as it existed prior to the directive, a second cause of action, if you will, based upon this directive, and that the thrust of it, in effect, is to make their system a bit more like our own, although I certainly did not understand that it was the same as our own. If I misunderstood—and I do not mean to detract from the Senator's time to ask questions—that was my understanding of the testimony.

Senator McCain. It is much more defense-oriented, clearly, and obviously it does not preempt current law in those countries, but it supplements it. And I would hope that the distinguished Chairman of the full Committee would look at that since he was touting it. And perhaps he could support it for that kind of rules to govern the way we do business here in the United States.

Secretary Mosbacher, do you disagree with what Senator Danforth said about the numbers, the cents out of each dollar? How much was that?

Senator Danforth. That was Senator Hollings who said 75 cents out of the dollar goes to lawyers.

Senator McCain. Is that your information too, Mr. Secretary?

Secretary Mosbacher. Well, we have figures that vary anywhere from the 50s to close to 80, but 75 percent sounds like a good figure, but no matter whose figures you use it is well over half goes to the lawyers, and well under half—it could be 25 percent, more or less—goes to the person who is the victim, the injured party.

May I just add one thing about the EC directive, and that is, first of all it has not been adopted by all the countries yet. Secondly, your point is an excellent one about our adopting what they want to put through as their new top-of-the-line product liability, because there is no punitive damages in there at all, none.

Senator McCain. Finally, my friend from South Carolina makes, I think, a very legitimate point that I would like to hear your response to. And that is that we are here, all of us, to protect the consumer. Yet Senator Hollings points out, I think accurately, that "consumer groups" that he cited, and at least one witness will be here, oppose this reform. How can you rationalize that, Mr. Secretary, or explain it?

Secretary Mosbacher. The only way I can figure it out, it must be run by lawyers.

Senator McCain. Perhaps that is the response, Mr. Secretary. But I do think it raises a legitimate question. Senator Hollings raises a legitimate question here, and maybe we can explore that further, because we claim to be on the side of the consumer. And here is an organization, or several organizations, which also make that same claim who are adamantly and vociferously in opposition. I think we need to resolve that.

I have no further questions, Mr. Chairman. Thank you, Mr. Secretary.

Senator Bryan. Thank you very much, Senator McCain. Senator Danforth?

Senator Danforth. Mr. Secretary, thank you very much for being with us this morning. I have been looking into a related but not identical issue recently, and that is medical malpractice. The information on medical malpractice that I have is that in a typical case 28 cents out of every dollar goes to the injured party, the patient, and 72 cents of the premium dollar goes to lawyers or insurance companies or something else.

Now, according to Senator Hollings, 75 percent of the awards end up going to the plaintiff's lawyers or the defense lawyers, which leaves only 25 cents on the dollar. So it is in the ballpark, although it is even worse than the medical malpractice situation.

Now, in medical malpractice, the cost of malpractice insurance is far from the only cost of the problem, because doctors are performing defensive medicine—practicing defensive medicine which is not necessarily wise or good medicine in order to guard themselves against lawsuits. What I want to ask you is, is there an analogy in business, in addition to the inefficiency of this system, as a way of awarding compensation to people who are injured? Is there another cost to it? Does it really affect the practice of American business?

I will give you just one anecdote, and I am sure that there are many others. Monsanto has its headquarters in St. Louis County, MO. Monsanto, after a long period of research, developed a biodegradable substitute for asbestos. They believed that this product was totally safe, and they were all set to go to market with this substitute for asbestos. And we all know the problems with asbestos and the cost of removing asbestos.

Monsanto was all set to go, and the CEO of Monsanto, Dick Mahoney, finally said we are not going to go to market with this product. And the people in his company said why not? He said, I know that no matter how safe it is, it is going to generate lawsuits and it is not worth it to us.

So the ridiculous transaction costs, with lawyers leaching 75 cents of the dollar out of the system is only a piece of the total cost, I think, and a much more significant cost is that we are not developing products that we should develop. Business people are being hyper-cautious about what is going to befall them, and that the cost of products and, therefore, America's ability to do business is being severely hurt.

So I would like you to tell me, do you believe that there is an analogy to medical malpractice in this regard, where, according to the American Medical Association, defensive medicine costs $12 billion a year? Is there an analogy in the business world in the product liability situation apart from the costs, that the lawyers are draining out of the system?

Secretary **Mosbacher**. Senator, there are many, many analogies, but let me give you a couple that are actually very close to the medical world. Union Carbide funded and helped develop a suitcase-sized kidney dialysis unit, a small one for home use, and after reviewing the product liability and the cost inherent and the legal and all of the things we have been talking about, they ended up selling it to a foreign company because they thought that the risk was too great for them to manufacture and sell it in this country, and that is both the medical aspects and it is the competitiveness aspect, and it is a direct cost to this country vis-a-vis competing with other countries that do not have these costs.

Another one is Genentech, one of our real leaders in the biotechnology area. They have been outstanding in this field. They were looking at developing and marketing a vaccine for AIDS, but the potential liability for that product was so great that they abandoned it. They abandoned their plans. Those are, in my view, tragedies for this country and for the poor victims.

There are lots more. I could go into new products and products that people have stopped selling, products where they go foreign because they cannot afford to either manufacture or sell them here. So I say you do not get 88 percent of the businesspeople saying that this is a major or large problem and 70 percent of all the small businesspeople saying that without it having a very high priority in the businessman's mind; and these are people who make the decisions.

Senator **Danforth**. I know that several years ago—I do not remember the year—there was a White House conference on small business. The number one priority they listed in that conference as something we have to deal with as a country is the product liability situation. That was some years ago.

Do you know whether or not that remains a leading or the leading concern of small business?

Secretary **Mosbacher**. I am absolutely certain it is a leading one, one of a very short list, and for a lot of them it is the leading one, yes.

Senator **Danforth**. Thank you.

Senator **Bryan**. Thank you very much, Senator Danforth.

Senator Kasten.

Senator **Kasten**. Mr. Chairman, let me just pick up on that. Not only a couple of years ago did the conference on small business list liability, but just weeks ago the NAM Small Business Council voted product liability their number one problem. One of my constituents, a small businessman, has termed this a survival issue. Unlike taxes, mandated benefits and other issues that are also of great concern, the survival of the company of this particular small businessman who happens to be in the audience today depends upon some kind of reform because he has these lawsuits pending which are greater than profits in certain cases. In examples I have seen in other areas we have lawsuits where the lawsuits are as great as the net worth of a number of these different companies.

Mr. Secretary, let me just try to address one part of this European question because I think it is important to recognize that one of our major problems is punitive damages. Most of these countries do not have punitive damages, and punitive damages are not part of this uniform effort in Europe.

I think it is also important to recognize that lengthy discovery proceedings are generally unavailable outside of the United States. Also, contingent fee arrangements are not available in Japan or Europe. So you do not have several of these different elements.

Now we are not trying to take away contingency fees, and we are not trying to stop punitive damages. What we are trying to do is to establish some kind of uniformity. The system in Europe and the fact that they are coming together so that each of those countries will have a uniform system I think is very important. They will be closer in terms of their product liability and their uncertainties. In Europe, France, Germany and Italy are going to be closer than Wisconsin, Illinois and Minnesota. That is crazy, and that is where we are going.

Now Senator Danforth mentioned the Monsanto example. There are an awful lot of other examples, such as the sole producer of DPT, Lederle. Four or five years ago there were four different companies in this business producing the DPT vaccine. Lederle is now the only one left, and the cost has gone from $2.80 in 1987 to $11.40 per shot. The difference is not the cost of the product. The product is the same. The difference between $2.80 and $11.40 is the increased cost from product liability lawsuits and insurance.

Dow Chemical is another company in the health area, Jack, that had a product on the market, Bendictin, that was safe. It was approved by the FDA and had sales of $20 million. They took it off the market because they had legal and insurance costs of $18 million. They took it off the market despite the petition of 12,000 doctors who said that this product should remain on the market because it was needed.

Now I have one other example, and then, Mr. Secretary, I am going to ask if you have any in this area.

Another is the problem of the 1970 product being used as evidence that the 1990 improved product is somehow unsafe. The best example of that is Ruger with the improved safe that they put on their pistol. In Alaska a person went into a PDQ or convenience type store and left a loaded Ruger pistol on the floor. His young son was in the car. The son played with the gun while the father was in the store. The father came out, the son had a serious injury, and they went to court saying that if this gun had been the 1980 or whatever year improved safety, it would not have been as likely to go off as it did and, therefore, they made this gun unsafely.

The opposite view is that Ruger did the right thing by improving the safety. They made a better and safer product, and that is what everybody should be doing in America. I believe there are lots of people now who, because of the sense that the change you make make you vulnerable in a liability suit, newer and improved products, better products that would be sold not only here but sold overseas, are less likely to come on the market.

The Monsanto example is a good one. These are products that we can sell here domestically but also products that we can export.

Do you have any examples in this area where products are not coming on the market that could help us in terms of our international competitiveness?

Secretary MOSBACHER. Before I get to some of those, let me mention one which I should have mentioned earlier regarding Europe versus the United States. This was one we asked Ford to check because they have gotten so big in Europe and around the world.

Over a third of their vehicles sold outside of the United States today. Yet, in the product liability area their costs are 54 times higher in the United States than they are in other parts of the world. So when I used that 20 times higher, the figure we have before, it is much less in the experience of one company a very big company and a very good company that keeps track.

Let me talk about some of these others, if I may, for just a moment and answer your question, those who have had to stop production because of the product liability cost. Some of them really make you sick because they have so much social value. One of them is Wetco which manufactures a driving aid for the handicapped, giving these people a chance to drive who can not. They removed this product from the market after operating for just 6 months because of the insurance and the cost of the insurance. In 1985 their insurance premiums rose from $1,400 to $18,000 the next year. That is the kind of thing that gets you.

Another one, more just in the commercial area but important, is Dineit Corp., stopped producing clutches for helicopters because the cost of the insurance has become prohibitive even though they have had no damage suits and no claims have ever been reported. There is no failing of the product; it is just the cost of the liability insurance.

Puritan Bennett stopped making anesthesia gas machines to avoid the risk of product liability suits. They have not had any but because of the risk, there again close to the medical area.

Uvex Winter Optical decided not to manufacture motorcycle helmets and ski racing helmets because of the liability costs.

Spaulding, a name which we all grew up with, has totally stopped making protective sporting equipment. That is one of the great old names in sports.

Frankly, I could go on and on. I have page after page of these, and the people are willing to come in when you call them.

In aviation, which has not gotten anywhere, I talked to Russ Meyers, head of Cessna, about this again because he has told me this time and time again. He said I could sell 3,000 single-engine planes today if I could manufacture them. Piper is the same way? I said are you sure? He said yes, you can say that. Piper and I have talked about it. They will not manufacture them, either. You know what is going to happen. Somebody in another country is going to pick this up, and we will be buying Messerschmidts or something from somewhere else. That is what is going to happen.

Just from the competitive standpoint, leaving aside all the other aspects, if you all expect us to do something in the competitive area you have to give us some help in this.

Senator **Kasten**. Mr. Secretary, my time has expired, and I thank you.

I wonder if we might, working with you and your staff, for the purpose of the record I would ask unanimous consent that you supply us a record of these different examples with an assignment, if possible, of the economic costs to our economy. We can judge the health and safety issue of these products not coming on, but you might be able to quantify somehow the economic cost in addition to the social and other kinds of consequences that all of us can judge for ourselves.

Mr. Chairman, is that agreeable?

Senator **Bryan**. It is. The record will be left open.[1] The Secretary will be given an opportunity to submit the information requested by Senator Kasten. We would like to have that as part of the record.

I thank the Senator.

Senator **Rockefeller**. Thank you, Mr. Chairman. Let me say just one thing, and that is, I would in fact caution our committee against getting sidetracked on the issue of insurance.

I think the case for Federal Product Liability Reform should not depend upon whether changes in tort laws will lead to reduced insurance costs, rates, stable or whatever. I think, rather, that the case for Federal product liability reform should turn on whether we have a system of fair and balanced product liability rules which provide guidance to the legal system and work to the best interests of all of the parties involved.

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[1] After subsequent discussion between Senator Kasten's staff and the Secretary of Commerce's staff the request for this data for the hearing record was subsequently withdrawn.

Mr. Secretary, in the colloquy that you were having with Senator Hollings on the EC directive, there is no state-of-the-art defense in our S. 1400 bill, but the EC directive establishes a state-of-the-art defense. The EC directive does give the directive strict liability which we already have in our bill. In joint and several, the EC provision is very similar to what we have in our bill. In the statute of limitations, however, theirs is three years, ours is two years. Theirs is more pro-plaintiff. The statute of repose is ten years under EC and 25 years under S. 1400; therefore, it is more pro-plaintiff.

Generally, I think it can be said that the EC directive is much more pro-defendant than our bill. I think again it is important to say that the EC directive recognizes the importance of eventually adopting a uniform system of product liability rules, and that is where the Europeans are ahead of us.

One question. Of all the things we have to do to make ourselves more competitive—this morning there has been mentioned education, research and development, math and science, deficit reduction, capital investment—they all cost huge sums of money. We have to do them; they are crucial to competitiveness.

Can you think of any other factor on the dollar side in terms of making America more competitive, any other single act that we could take than product liability reform which in terms of dollars would be simply a change of law?

Secretary MOSBACHER. No, I cannot, Senator. I will tell you, I also asked quite a few business people this, and they feel the same way. It is just such an important every year cost to them, that it has a very direct impact, so I cannot think of anything.

Senator ROCKEFELLER. But in terms of the Federal Government, the impact of Federal tort reform would be zero, would it not?

Secretary MOSBACHER. Correct, Senator.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Rockefeller. We have been joined by Senator Pressler. Senator Pressler.

Senator PRESSLER. Thank you very much, Mr. Chairman. I apologize for being late.

I do have a question for Secretary Mosbacher regarding how we present this issue to consumers. As has already been noted in this hearing, the Consumer Federation of America opposes this bill, or opposes what we are trying to accomplish here. I find it very hard to believe that the Consumer Federation would oppose it, because the average consumer will be able to buy products at less expense.

On the other hand the Consumer Federation will say that the average consumer could sue more easily or recover a greater amount in the case of a lawsuit under the old system, under the present system. I certainly do not want to take away the right of a plaintiff to sue. How would you articulate to a group of consumers the need for this legislation?

Secretary MOSBACHER. Well, it would be very easy for me to tell a group of consumers that not only would they be able to buy the products that they get today at lower cost eventually—because it has to work its way through the system—but that they would have the benefit of many new products that people are afraid to bring out, and their fear is based on the cost being so prohibitive that companies would be opening themselves up to suits, like Senator Danforth's Monsanto case with the asbestos, and the only real asbestos part of that equation was that it would be associated in people's minds with asbestos, which was associated with cancer.

So there would be lots of new products, better products, advances. There are two companies, for instance, in baby seats in cars, safety seats, one of which had developed what looked like a newer, better baby safety seat, but after going over the costs—not the cost of manufacturing, but the cost of liability and the problems of liability, they decided not to come out with it.

I would tell consumers that that is a perfect anecdote that shows them that they could be getting what appear to be a newer, better baby seat, that they have lost this chance because of this product liability problem.

There is another company that already makes them that is going to stop making them because their costs are—again, not the cost of manufacturing but the cost of liability are elevating so horrendously.

Senator **Pressler**. I think that is very important that we get that point across. In my current reelection campaign I am strongly opposed by the Trial Lawyers of America. In fact, their first major effort was for my opponent. I find the debate centers around the fact that Senator Pressler would take away from a little old lady the right to get a lawyer and sue General Motors, and I am trying to move that debate—I certainly want her to be able to sue General Motors.

Secretary **Mosbacher**. Under this bill, as you know, she still can.

Senator **Pressler**. She certainly can, but I think that her products would be cheaper and she would have more of them available. But that is the essence of the debate across the country, and that is why it has taken so long to get this bill this far. We had a ten to ten vote here a few years ago.

But I thank you very much for your leadership, and I will quote you.

Senator **Bryan**. Thank you very much, Senator Pressler. Let me just exercise the prerogative of the Chair for one last question, if I may, and we appreciate your time and your testimony, Mr. Secretary.

Senator Danforth and others, Senator Kasten and yourself, have cited a number of examples of products that were not manufactured and made available in the marketplace. You, Mr. Secretary, cited the suitcase-sized dialysis machine that was not marketed because of product liability. Cessna and Piper are not manufacturing airplanes, at least the single-engine airplane. They estimate, as you indicate, some 3,000 airplanes that could be sold.

My question to you is, if we pass S. 1400, will Monsanto and dialysis machine manufacturers and Cessna and Piper, will they bring those products to the marketplace, in your view? It seems to me it is a fair question, because you are asking us to pass the legislation and there is clearly a problem, and I am troubled, as are members of the Committee, that these products are not in the stream of commerce, as they should be. So it seems to me the question is, if we pass S. 1400, are we going to see those products?

Secretary **Mosbacher**. It will be a major step. Of course, always the decision is the individual decision of these companies, and they and their people will have to look at how effective S. 1400 is. At its least, it is a very important step in the right direction. At its best, in some of these cases it may very well make the difference between going back into manufacturing or doing additional research and development.

Senator **Bryan**. But, as you pointed out, you know these executives personally, many of them, based upon your 40 years of experience in business, and I realize you cannot speak for them, but you can at least share a highly informed and educated opinion and judgment that you can share with this Committee. Do you think with S. 1400 we will see some of those products, if it is passed?

Secretary **Mosbacher**. Yes, and I would have to put it in the context of what I would do. If it makes that difference, it could lead me back into the field, yes.

Senator **Bryan**. Well, we thank you very much. You have been very generous with your time and very helpful in responding to all of our questions. There may be other questions that members have, in addition to the part of the record that we have kept open to respond to Senator Kasten's question, and we thank you again, Mr. Secretary.

Secretary **Mosbacher**. Thank you, Mr. Chairman.

Senator **Bryan**. The first panel this morning will consist of Dr. Julie Fox Gorte, the Project Director, Office of Technology Assessment, Mr. Gene Kimmelman, the legislative director, Consumer Federation of America, Dr. Malcolm Skolnick, the Neurophysiology Research Center, Health Science Center at Houston, University of Texas, and Mr. Harry Featherstone, the President and CEO of the Will-Burt Co.

The Chair would note that Dr. Skolnick apparently has not yet joined us, but in the interests of time I am going to begin, and when he is able to join us we certainly want to hear his testimony.

Let us begin this morning with the Office of Technology Assessment. I hope I am pronouncing your name correctly. Dr. Gorte, we will hear from you first.

STATEMENT OF DR. JULIE FOX GORTE, PROJECT DIRECTOR, OFFICE OF TECHNOLOGY ASSESSMENT

Dr. **Gorte**. Thank you. Thank you, Mr. Chairman, for asking me to come and testify this morning. I appreciate the opportunity to be here.

We share your concern over competitiveness of U.S. business probably as much as anyone. We have been working on the subject of improving manufacturing competitiveness for three-and-a-half years and that work is continuing.

What we have done so far is that we have released two reports. The first, called "Paying the Bill: Manufacturing and America's Trade Deficit," concluded that we did have a problem developing and diffusing manufacturing technology, and that we needed to solve in order to solve our trade deficit with the least possible damage to our standards of living.

Our second report, which we released in February—this will be the second time you have heard this, so I will keep it brief—concluded that there are many things that the U.S. Congress can do to help as a partner with U.S. manufacturing companies to improve their competitiveness particularly in technology development and diffusion.

Looking at such a broad issue, we had to narrow the list of problems that American manufacturers face in that effort to a very short one that includes only those things that have broad pervasive effects on manufacturing competitiveness.

The four that we finally chose as the most important steps that we think this Nation could take to improve competitiveness are first to lower the cost of capital, second to improve the quality of our human resources, particularly in math and science and engineering but also the quality of the working man and woman that spends his or her time in the factory, third to improve the diffusion of manufacturing technology to small and medium-sized businesses in America, and fourth, as government to enter into a partnership with business to fund very risky but very promising, very expensive long-term R&D in high tech areas where foreign governments are participating with their industry to develop new products.

Product liability has come up a few times. As we began this study we talked to a lot of experts and a lot of industries. Instead of asking them the question, "Is X important to you"—is antitrust important to you, is product liability important to you—we said, what is important to you?

What we found is that cost of capital, human resources and access to technology, to really good state-of-the-art knowledge from a disinterested expert, were the things that came up most often. Every now and then product liability would be mentioned. A lot of people mentioned antitrust.

We had to winnow that list of things that we could get our arms around in a study that for us is probably typical but for the Congress must seem like the Bataan death march, so we tried to keep it short. As a result, we left product liability off our list of things that we analyzed and we have concluded that it is not among the things that we regard as the most important things that the Congress can do to improve manufacturing competitiveness. This does not mean that we think it is unimportant.

I came back yesterday to testify to this hearing. I came back from a long trip to talk to people who manufacture aircraft and engines and things that go onto aircraft, and they certainly think it is a problem, and so does one of the members of our advisory panel who makes ball rolling equipment, which is a kind of machine tool.

Certainly there are industries where product liability appears to be a very important impediment to competitiveness, and we would never dispute that. We, however, did look at the factors that we felt were most important across-the-board, and as I said, those are cost of capital, quality of human resources, technology diffusion, and risk-sharing in new, high technology development.

I would like to keep my statement short because I know you are more interested in talking about product liability than these other

issues. So I think I will stop there and see if anyone wants to get into any of these other issues.

[The statement follows:]

STATEMENT OF

DR. JULIE FOX GORTE

PROJECT DIRECTOR

OFFICE OF TECHNOLOGY ASSESSMENT

Mr. Chairman and members of the Subcommittee, we appreciate the opportunity to appear today to discuss the topic of industrial competitiveness, and the findings of our recent report, Making Things Better: Competing in Manufacturing.

The study was requested by Senators Packwood, Heinz, and Garn, on behalf of the Senate Committee on Finance and the Senate Committee on Banking, Housing, and Urban Affairs. The House Committee on Banking, Finance and Urban Affairs later added its request for the study. The report we discuss today is the second in a series of three. The first, entitled Paying the Bill: Manufacturing and America's Trade Deficit, was published in summer 1988. That report concluded that American manufacturing technology and competitiveness must improve in order to eliminate the trade deficit without substantial harm to American standards of living. Our second report, Making Things Better, provides analysis of and options for improving manufacturing technology, so as to improve American manufacturing competitiveness.

American manufacturing competitiveness is at a low ebb. In part, that's because manufacturers themselves need to make greater efforts to improve productivity, use people and machines more effectively, improve quality, and pursue markets more assiduously. Many manufacturers know that, and are making progress. Unlike many of their foreign competitors, however, they don't have the full support and assistance of their government in making those improvements. The economic and public policy environment of the United States is simply not as conducive to improving manufacturing competitiveness as are those of Japan, Korea, Taiwan, and many if not all the nations of the European Community. Today, we will summarize our findings about how government assistance could improve U.S. manufacturing competitiveness.

When OTA launched its assessment Technology, Innovation, and U.S. Trade, we made a long list of the things that we thought and others told us were the biggest handicaps facing U.S. manufacturing. We winnowed the list over the course of the study to the most significant handicaps, and those that affected many manufacturing industries across the board. Because this is a very broad study, we were not able to focus on issues that seemed to be vitally important to the competitiveness of only a few industries. Such issues included, among others, the need for vertical integration within companies, the effect of offshore production on U.S. manufacturing know-how, and product liability. We believe these issues are important, but in our discussions with manufacturers and experts across a wide variety of sectors, they tended to come up only in reference to a few industries. For example, one member of our advisory panel owns and manages a company that makes machine tools, and he says product liability is one of his biggest problems. The same is apparently true of the small private aircraft manufacturing business.

The issues that ended up on our shortest list of competitive problems are capital costs, the quality of human resources, and technology transfer and diffusion. In addition, several other issues have less important but nonetheless pervasive influence.

These include the special difficulty of accessing Japanese technology; the merits of industry-university research consortia; intellectual property protection; and antitrust law and enforcement.

Capital costs affect everything a business does. In particular, however, high capital costs penalize long-term investment, and remaining at the forefront of technology demands long-term investment. The American financial climate is less supportive of investments in manufacturing--particularly long-term investments in R&D or plant and equipment than the financial climates of Japan, West Germany, and many of our other trading partners. Investments in both R&D plant and equipment are needed to keep up with the competition. A principal reason for the less supportive environment in the U.S. is high capital costs.

The combination of massive Federal budget deficits and anemic personal and business saving is instrumental in keeping real interest rates high, which is an important determinant of capital costs. For some kinds of investment--R&D, for example, or plant and equipment--American capital costs are often up to 50 percent higher than those of Japan and West Germany. This, in turn, encourages managers to increase their emphasis on short-term returns. If everyone were doing so, this would not be such a problem. But the capital markets of Japan, Germany, Korea, and to a lesser extent other nations, have long been managed so as to encourage long-term investment, particularly capital investment and R&D. In such a world, our own short term focus is a sure loser.

Another part of the financial environment that has discouraged long-term investment in manufacturing is takeovers. We are not talking about ordinary merger-and-acquisition activity, as a normal part of America's business environment. These probably have little effect on R&D or capital investment. But the wave of hostile takeovers, defenses, and LBOs of the 1980s is a different matter. The best defense against a hostile takeover is a high stock price, which in turn depends heavily on short-term profits and pay-out. Overemphasizing near-term profit performance is generally not consistent with long-term investments in technology development or improvement. While the impact of mergers and acquisitions as a whole on corporate R&D throughout the economy has been small to insignificant, the story is different for hostile takeovers (or defenses against them) in manufacturing, and it is also different in capital investment. Hostile takeovers and other forms of externally induced restructuring have resulted in reduced investment in R&D in manufacturing companies that have faced hostile takeover bids, and the general slowdown in R&D expenditure in manufacturing may be partly attributable to companies' financial maneuvering to avoid becoming takeover targets. Moreover, mergers and acquisitions are commonly associated with curtailed capital investment.

Like capital costs, human resources have pervasive effects on manufacturing. Managers, parents, educators, and policymakers have grumbled for years about the shortcomings of American public schools and the poorly educated work force, but the talk now is of a crisis. Young people leaving school with meager math and reading skills, and midcareer workers who have not brushed up their math and reading skills in years, are not prepared to deal with computer printouts and digital analyzers to monitor quality on the assembly line. Yet those are just the kind of skills state-of-the-art manufacturing demands.

There is a broad consensus that the Nation's public school system needs help. Even if help arrived tomorrow, however, results would be many years coming. A more immediate approach--though not a substitute for improved primary and secondary education--is to upgrade the skills of people already in the work force. Some large companies are providing education and training themselves, but smaller companies are often unable to; moreover, the financial burden even for large companies can be substantial.

Here, too, we compare poorly with many of our competitors. The German system of vocational education is world-renowned for its depth and high quality, and turns out capable, intelligent workers at all levels of German enterprise. Japanese vocational education is not so extensive, but primary and secondary education in Japan is both universal and world-class. Moreover, large Japanese businesses (and increasingly, many medium-sized ones as well) invest regularly in training programs for their workers. (The issue of worker education and training is being addressed in another OTA assessments, Worker Training: Implications for Competitiveness, to be delivered later this year.)

Another problem for manufacturers in all nations is the difficulty, particularly for small and medium-sized enterprises, of keeping up with technology. Americans are accustomed to thinking of U.S. manufacturers as technology leaders, and indeed, some are. But many are not; lots of small and medium sized firms rely solely on word of mouth, journals, or vendors for their information about new technologies, and some are stuck in a technological backwater.

For many of America's 355,000 small and medium-sized firms, the difficulty of acquiring competent technical knowledge and assistance is formidable. Large manufacturers transfer some technology to their smaller suppliers, of necessity, and vendors and consultants also contribute. But these kinds of support do not come close, in either amount or character, to the broad, deep institutions in Japan and Germany that support technology diffusion to small and medium-sized enterprises. The Federal government and some States have initiated programs to give technical assistance and training to small firms, and there is room for considerable expansion. Together, Federal and State efforts to demonstrate technologies and transfer technical knowledge one-on-one to firms probably add up to no more than $40 to $50 million a year. Japan spends tens of billions of dollars a year on technology extension, and tens of billions more on loans or loan guarantees that help manufacturers to implement the advice they get.

Federal programs include (1) three existing and three more planned Manufacturing Technology Centers (the Hollings Centers) to demonstrate advanced technology and provide extension, (2) some assistance to State extension programs, and (3) the Advanced Technology Program, a mechanism for Federal guidance and participation in joint R&D ventures with private firms. Together, these three programs have funding of less than $19 million for fiscal year 1990. While they are small, they are generally regarded as steps in the right direction, and some in industry have already found them useful. A smattering of other programs--the largest of which, Trade Adjustment Assistance, is funded at less than $10 million--provide some technical assistance, but the whole effort together is small in comparison to the need.

Financial aid, in the form of loans or loan guarantees with subsidized interest rates, is a cornerstone of Japanese technical extension. Industrial extension may be useless to some small manufacturers unless there is also the possibility of some financial aid, because in some cases the recommendation is for things that cost more money than small businesses have on hand: new plant or equipment, new designs, training, and the like. While all businesses are handicapped by high capital costs, small businesses have special financial problems; they must usually pay more for both debt and equity capital, and retained earnings may not be large or steady enough to rely on.

In OTA's view, these problems are the most significant that American businesses face if they are to improve their technical performance--that is, if they wish to improve productivity and quality while controlling costs. That is, of course, the key to improving competitiveness, which in turn will help eliminate our trade deficit. Our report, Making Things Better: Competing in Manufacturing lays out policy options in each of these areas. In addition, we suggest an approach that would tackle several problems at once: government support for selected technologies of great promise but high risk and cost, through a civilian technology agency. In many high-tech industries, the costs of developing next-generation products, constructing manufacturing facilities, and refining manufacturing processes now commonly run into the hundreds of millions and even billions of dollars, and require years, so that few companies but the largest and most financially secure can afford the game. Even for those, keeping up with--or ahead of--the competition may involve bet-the-company investments. Especially in America's financial environment, which is less conducive to such investments than those of Japan or West Germany, some support from government could make an important difference. A civilian technology agency, if managed well and given the proper mandate and resources, could share the risks of developing critical technologies with industry, as the governments of most other OECD nations and the European Community are doing.

No one of the options we suggest, and no other single fix applied to the Nation's competitive problems, will have much of an effect. The difficulties American managers face are too numerous to be solved by a couple of new policies or a small amount of money. Manufacturers must also roll up their sleeves and solve some of their own problems. In short, if we wish to restore our competitive edge we need a substantial and sustained commitment, as a nation, to rebuild our competitiveness. We must do so if we intend to pass on to our children the same rising expectations we grew up with.

Senator **Bryan**. We appreciate your testimony. Each of us have, of course, the full testimony that you have submitted and made available to the committee.

Mr. Featherstone, we would like to hear from you next, please, sir. Welcome this morning.

STATEMENT OF HARRY FEATHERSTONE, PRESIDENT AND CEO, WILL-BURT CO., ORRVILLE, OH, ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. **Featherstone**. Thank you. Thank you, Mr. Chairman and Members of the Subcommittee for allowing me to be here today. I am here on behalf of the National Association of Manufacturers and, I think, 300 people in Orrville, Ohio who work with me. I am President and CEO of the Will-Burt Company. I would appreciate your inserting my statement into the record. I will summarize as follows.

Everything I have heard this morning has been about products that have left us and the jobs transferred overseas because of this. We have had some of those, too. We gave up making aircraft parts in 1985 because the attorneys told me to stop doing it. We laid off 80 people or so. Those were jobs.

We have 300 people, consumers I think they are, in our factory, who are scared to death for their jobs every day. We have had many lawsuits because we are a 70-year old company. We went to an LBO in 1985–86 so the company would not be liquidated due to lawsuits and went to a 97.4 percent ESOP.

We have fought the lawsuits and won every one of them so far. Cost has been tremendous to us. We average right now over $200,000 per year for a $20 million sales company. We have spent over $600,000 in the last three years in liability insurance in defense costs and in my travel. That is real dollars. That is not my time.

In the same 3 years we made $100,000 in the bottom line per the auditor's statements, so you can see where the defense costs left us.

We do not have to worry about Belgium and the other countries against which we used to quote because we are now too high to quote against them. In 1981 we took about 500,000 into Orrville, Ohio of parts for companies in the world away from Belgium and Brazil, and now we do not even get a chance to quote.

Our people, are 300 welders, assemblers, painters who I call the backbone of the world, are the most efficient, the very best educated, produce the best quality of anybody including or superior to the Japanese, and we want a chance to be in competition with them.

It is very hard to talk to a welder and tell him why we cannot get a State grant for $200,000 to start a new plant because the State says you have litigation against you that may destroy your company and they are not going to give you the grant.

It is very hard to tell him that we cannot raise our prices because we are in competition with overseas and if we raise our prices to give us an increase or a benefit that we are going to be losing our jobs. Liability costs have done this.

It is very hard to tell them that you cannot bring a new product in that some of the people in the plant have spent a couple of years developing because you know that the attorneys will get you on it because of the problems that could be involved with it.

Kenny Borite, one of my 62-year old stainless steel welders, told me before he left, "Harry, we were proud of you because you got to the Senate". He said, "we do not think it is going to do any good for jobs for us, but we are proud that you are trying." (Some of you people may not like this.) He said "they down there love attorneys. They do not like jobs for people."

Now I told him, no, that is not true. I said, no, they will listen to us. I am happy that I got here today, and I am pleased you listened. Thank you.

[The statement follows:]

TESTIMONY ON S. 1400
THE PRODUCT LIABILITY REFORM ACT OF 1989

BY HARRY FEATHERSTONE
ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE
SENATE CONSUMER SUBCOMMITTEE
OF THE SENATE COMMERCE COMMITTEE
APRIL 5, 1990

Good afternoon, Mr. Chairman and members of the Committee. My name is Harry Featherstone. I am the President and Chief Executive Officer of the Will-Burt Company of Orrville, Ohio. I want to thank you for the opportunity to testify today on behalf of the National Association of Manufacturers. I want to commend the Chairman of this Subcommittee and the sponsors of S. 1400, Senators Kasten, Danforth, Rockefeller and Inouye, for their leadership in bringing the critical issue of product liability reform before the 101st Congress.

The Will-Burt Company is one of NAM's small companies. We are a 300 person 97% Employee Stock Ownership Plan manufacturing company formed in 1985 from a 67 year old company in Orrville, Ohio. For the last 70 years we have been a true employee-oriented, community-oriented company. We produce steel fabrication and machined parts for original equipment manufacturers that go all over the world. We know we are the highest quality and best in delivery, and we think we have the most highly educated 300 people in the world for our type of business. All of us are ready for Trigonometry at the college level. We met the President's Year 2000 goal last year.

I. Introduction

The NAM has supported enactment of fair federal product liability reform for nearly a decade now. Today, however, the crisis facing small and large businesses is extremely grave. So grave, in fact, that this year NAM's Small Business Forum voted product liability reform their number one issue. Every day NAM receives letters from companies, both large and small, that are discontinuing lines of good products because of "potential future risks." Still others report increasing product costs, an unwillingness to undertake research and development of certain products and an inability to compete in the world marketplace. In all too many cases, we are hearing of plant closings, the decline of entire industries and companies who are without insurance. Many of NAM's small companies "going bare" readily admit that one huge product liability suit will result in bankruptcy and an end of their family business. They want an end to this situation.

As a result, we urge this subcommittee to quickly and rapidly complete action on S. 1400, a fair and modest product liability bill. We believe that the concepts embodied in S. 1400 are important first steps in correcting what is wrong with the current product liability system. Basically, the system is out of balance and out of control. Manufacturers are penalized not only when they are at "fault," but often when they are not. In all too many instances the errant behavior of the plaintiff is not even considered when verdicts are reached. Punitive damages are now sought in far too many cases, despite the fact that rarely has a company acted with conscious disregard to the safety of others. All too often punitive damages are awarded when the behavior of the corporation didn't warrant it. In the case of the Will-Burt Company, we are sued more and more often when there is no basis at all.

NAM, whose diverse membership is severely affected by the impact of product liability laws, does not seek a reform of everything we believe is wrong with the system. S. 1400 is a very modest approach to a severe situation. Nonetheless, we support this measure for three major reasons. First, it will help enhance product safety and encourage innovation by providing some uniform and clear guidelines about what the rules are governing product liability. Second, federal product liability legislation will cut down on legal costs by curtailing out-of-hand transaction costs. Finally, uniform product liability laws will assist self-insurers and commercial insurers alike in making a reasonable determination of risk, thereby helping to stabilize the insurance market.

Specifically, we support the following key elements of S. 1400, which we believe will benefit consumers and manufacturers alike: 1. Creation of a uniform and tougher standard for the imposition of punitive damages. 2. Abolishment of joint and several liability for noneconomic damages. 3. Establishment of a complete defense where a claimant's use of drugs or alcohol is more than 50-percent responsible for the accident or event which caused harm. 4. Enactment of product seller liability for harm caused by their own fault. 5. Establishment of an alternative dispute mechanism. 6. Establishment of a reasonable time limit after which a manufacturer will no longer be sued for injuries caused by the product; and 7. Reduction of transaction costs by prohibiting employers from suing manufacturers to recover their workers compensation claims.

The federal product liability standards in S. 1400 will help provide a "level playing field" for U.S. manufacturers and will seek to improve U.S. competitiveness by creating an atmosphere that encourages us to be once again on the cutting edge of innovation. Instead of being sued for making a better mousetrap, we will be encouraged to design one. We think that S. 1400 is a step in the right direction.

II. The Impact on One Company: The Will-Burt Company

For almost 70 years, the Will-Burt Company was a small manufacturing business owned by a wonderful Orrville, Ohio, family, that through thick and thin had been a community-oriented, charity-oriented, and working person oriented company. That changed in 1982 through 1984 as a result of joint and several liability settlement in Florida that was a disaster to the company. We were hit by a six million dollar lawsuit over parts we made in the 1960's for a product we did not design. We just produced the parts to our customer's print. The equipment manufacturer saw the lawsuit coming and bankrupted itself. This left us and many others as "deep pockets." After two years our insurance company settled. As they explained to me at the time, in Florida the trial attorneys control justice for themselves. "Deep pocket" means if you are found 1% guilty, you lose. As one said, "Harry, if you touched the print you're guilty." This killed our owner and president. His family and each of his co-workers will attest to this -- he died after the case was lost.

After the settlement, all insurance companies walked (or ran) away from us. We lost all insurance for a few months and the family was told to get out of the business. Congressmen, law firms, and others told us, "Liquidate the place or sell it off now. The trial lawyers will take all you have. Your company has been in business too long."

As a result of this liability crisis and the death of the man who owned us, Will-Burt had to be reorganized. We mortgaged everything we had and purchased Will-Burt from the family in 1985. The employees now own 97.4% of the company through an Employee Stock Ownership Plan. As part of the reorganization, we are now a highly leveraged company. In four years we have gone from a debt-free company to a highly-leveraged one to save our workers' pensions and their family's daily wages. Our workers have suffered a loss of income that cannot be measured -- payment for defense attorneys and liability insurance that is four to five times the cost in 1985.

Since 1984, we have had two identical lawsuits in a western state and in a far western state. After years of expense, time, and fear, we won one case and bought our way out of the other. We were told by the judge in a settlement conference, "You are not guilty of anything, but the plaintiff can keep you in the case so pay them." In another case we were told the following by our defense attorney: "We have proof your unit did not cause the fire, but pay $20,000 to $40,000 to each of the plaintiff's attorneys. It will make them happy and you may lose the trial although you are innocent."

Our liability costs jumped from an average $50,000 per year for insurance and defense costs to over $200,000 in 1986. In 1986, we had to lay off 80 employees to cut our losses and to pay attorneys. We have not bought equipment for our shops due to the nonproductive costs. We have lost most of the R & D and the future development of the company due to this. In some months, over half my time is spent in litigation. We have had a continued deterioration of our competitive advantage against Canada and offshore companies due to increase in our overhead costs. We have direct competition with Belgium, England, South America, Canada and the Orient. We are faced with this everyday and are losing to these people.

We have 300 people, some of whom have been with the company 35 to 40 years. We are not unique in this. Small business becomes very family oriented. We are noted for perfect quality. We can beat any company in the world in efficiency and quality with our people.

We are the best and want to grow. We cannot without your assistance in bringing a national liability system that lets us walk out of the fear cloud and permits us the same rights as Europe and Asia. Only you can create working persons' jobs in the next 10 years. We need S. 1400 in the U.S.A., and we need it now, not later when more jobs are lost. As we say in Wayne County, Ohio, "We will make it if God is willing and the creek doesn't rise." The creek is rising.

III. The Impact on Specific Industries

The impact of our current "sue-'em" society is far beyond one small company. I would like to give you some examples.

Monsanto Company abandoned the planned production of phosphate fiber, a substitute for asbestos, because of potential product liability risks -- even though the product had been proven to be safe.

Lederle Laboratories, the lone maker of diptheria, pertussis and tetanus (DPT) vaccine, raised its price per dose from $2.80 to $11.40 in 1987 to pay the costs of increased law suits. Americans now depend on single companies to supply vaccines for polio, measles, mumps, rubella and rabies.

Union Carbide has forgone developing a suitcase-size kidney dialysis unit and offering intravenous equipment.

Playmaxx, Inc., of Tuscon, Arizona, is a newly reorganized company that has been manufacturing yo-yos since the 1930's under the familiar names Duncan, Duncraft, Duracraft, and now Playmaxx. The product has never had a claim against it in 58 years, yet its "liability tail" continues to push up its product liability costs.

Rawlings Sporting Goods, a leading manufacturer of competitive football equipment for over 80 years, announced in 1988 that it would no longer manufacture, distribute, or sell football helmets. Joining Spaulding, MacGregor, Medalist, Hutch, and others who have stopped manufacturing helmets, Rawlings was the 18th company in as many years to give up the football helmet business due to increasing liability exposure. Two manufacturers remain.

Forenta, Inc. of Morristown, Tennessee, a manufacturer of commercial laundry and dry cleaning pressing equipment for 28 years, faced its first product liability suits in the last three years for small burn injuries. Though the manufacturing equipment was made to the designs and engineering of another firm in the three Pennsylvania cases, and met OSHA and ASNI requirements in the other case in Michigan, injury claims that should have been settled for $300 - $400 through the workers compensations system instead grew into $30,000 settlements when Forenta was sued. $25,000 in each case came from Forenta to meet its insurance deductibles, though it did not approve of the insurance company's willingness to settle.

Piper Aircraft estimates that insurance costs add $75,000 to the cost of every new plane. Their product liability costs are said to be higher than their total cost of manufacturing some small aircraft. As a result, Piper and firms such as Beech

Aircraft and Cessna Aircraft have had to abandon some product lines and shut plants. In 1979, the industry produced nearly 18,000 planes but by 1986 the number had decreased to less that 1,500 planes. Overall industry employment is down 70 percent.

The president of Unison Industries, Inc. of Rockford, Illinois, said that his form is withholding from the market a new and advanced electronic ignition system for light aircraft because of the liability risk that might result from its release and use.

In early 1986, the pharmaceutical firm of G.D. Searle and Company decided that even though its intrauterine contraceptive Cu-7 was approved by the Food and Drug Administration as safe and effective, the company should discontinue this line of business. Searle had reported spending $1.5 million in 1985 to defend itself against four suits -- each of which the company won. Weighing the product's potential sales value of $11 million in 1985 against the prospect of future litigation costs, the company decided to discontinue the product.

The sole domestic manufacturer of anesthesia gas machines, Puritan-Bennett, stopped making the devices in 1984, leaving the market to two foreign competitors.

There is hardly an industry that is not hit hard. Manufacturers of safety valves, chairs, air compressors, chemicals, colas and aspirin are all experiencing similar problems. The costs are either being passed on to consumers or companies are shutting down.

IV. Conclusion

We firmly believe that the liability crisis does not stem from the fact that U.S. manufacturers produce shoddy products, while foreign manufacturers produce safer ones. Rather, foreign manufacturers are not subject to the same laws to the same degree we are.

The U.S. product liability laws are seriously restricting American manufacturer's ability to compete in the international marketplace. Moves must be made to restore balance and stability to our system. Specifically, I would urge every member of the Subcommittee to support S. 1400.

The reforms in the bill are modest reforms and probably do not go far enough in bringing a balance back to our system. But they are a starting point and we would urge you to endorse them in efforts to make America more competitive and provide needed standards that will benefit people who make, sell and use products. Without federal product liability reform, the crisis will escalate and ultimately American consumers will pay the price, as insurance and legal costs are passed on and U.S. products disappear from the market place.

Finally, I'd like to say that more than anything else, fairness in product liability laws will underscore that making better products and improving the lives and economic futures of our employees and their communities is our number one priority. I would like to be able to make my decisions based on quality and safety and pride in our products rather than listen just to the decisions of our lawyers and risk managers.

Thank you for the opportunity to address these important issues.

Senator **Bryan**. Mr. Featherstone, we thank you for your testimony. We will have a round of questions after we have heard the entire panel.

Dr. Skolnick, we will hear from you now, sir.

STATEMENT OF DR. MALCOLM SKOLNICK, NEUROPHYSIOLOGY RESEARCH CENTER, HEALTH SCIENCE CENTER AT HOUSTON, UNIVERSITY OF TEXAS, HOUSTON, TX

Dr. **Skolnick**. Thank you, Mr. Chairman. Good morning to you and the other Members of the committee. Thank you for the opportunity to talk about S. 1400 and the burden it will help lift from researchers like me and others who convert the output of our laboratories into useful commercial products.

I am a professor of biophysics at the University of Texas, Health Science Center at Houston. I am also a registered patent attorney. I am pleased to be an attorney, and while I see some of the problems we have caused, I think we can also help provide some of the solutions.

The experiences that I want to talk about today I believe reflect not only my own activity but many people like me who are involved in developing new ideas and passing them through the technology transfer apparatus to the commercial stream where they can help people.

I would like to tell you about the message that we receive in university laboratories regarding our collaboration with government and industry in trying to develop new ideas and make them available to people. The message is twofold. We observe a set of rules that come from the FDA that are both written and administered by professionals. These rules give guidance as to requirements procedures. They are tough rules and take a long time to fulfill, but they are fairly consistent, and they are understandable.

The second message we hear comes from the product liability system. It is a message filled with inconsistencies. It tells us that ideas that might be developed, may not because the risk is too great. It tells us that safety is a premium but new information about safety is dangerous. It tells us how to practice medicine. It tells us what risks we can take prudently and what we cannot.

This message is delivered by lay judges and juries, not scientists and physicians. Something is out of whack in the system that we inhabit when those dual messages which frequently conflict with each other cause us who are in the front end of what I think is this stream of development to lose time, to lose effort, to lose opportunity.

For the last six years my own research has been directed at developing a new form of electrostimulation. This is a very low current, low frequency electrical signal applied to subjects and can interact with regions of the brain in changing various neurochemicals. We have applied this treatment to help people with chronic pain, and we have applied it to help people quit smoking; our best results have come from experiments where we have been able to virtually eliminate withdrawal symptoms from drug-addicted animals.

We took these results, and the approval of our Institution Review Board, and the agreement of a number of physicians that were participating in the study and made a proposal to a neighboring hospital that specializes in addictive disorders to conduct a chemical trial., We were unable to convince the board at that hospital, advised by its attorneys, that this new treatment was something that they should allow to be investigated in their hospital simply because they found that the treatment was too new and too risky. We eventually did get their approval, but by that point the sponsor for this research, which was a business, could not stand the delay and cancelled the project and moved it elsewhere.

A former student of mine who earned his Ph.D. under my supervision is now professor of cardiology in our medical school. He has worked throughout his career in developing new treatments for heart attacks, in particular with anticlotting agents. These agents, if applied fairly recently after the heart attack begins, have had some remarkable results in saving people's lives and lessening the severity of the attack.

There is a problem with these drugs because they interfere with the body's ability to make clots, and if there is an untoward event, rupture of a blood vessel, especially in the brain, the presence of these anticlotting agents can make that event much worse.

The physicians in our medical center and others throughout the country have begun to be so fearful of the possibility of suit from a sufferer of a stroke when these agents are employed that they are beginning to think twice about whether they can apply this lifesaving treatment.

It is important to note that studies have shown that this treatment can reduce mortality by a factor of 50 percent. That is, one person in two who was going to die or be seriously affected by a heart attack has a better chance with this drug. The incidence of stroke made worse by the presence of this drug is about one-half of 1 percent, about 1 out of every 200 patients.

What we are permitting to happen in the product liability system is the risk completely dominating the benefit. We do not have a risk benefit balance anymore because the operation of the product liability system has drastically reduced the opportunity to consider evidence about what the balance of risks and benefits really means.

I would like to close with the example of a computer-controlled medication pump that scientists at my university developed. The scientists assigned their invention to the university. The university licensed this technology to a manufacturer. Both the researchers and the university were pleased. They felt that this very beneficial pump, demonstrated to be more effective than conventional means in delivering a drug called Cyclosporine used in immunosuppressive therapy, would now become more widely available to patients.

The manufacturer has not exercised his license. In informal discussions it was learned that he is probably not going to. The reason he is not going to is he has seen examples of suit attacking other forms of computer-controlled devices. He cannot afford the risk. He is a small manufacturer and cannot afford to go forward.

Mr. Chairman and Members of the committee, from my viewpoint competitiveness starts with new ideas. The present product liability system tends to stifle new ideas. The very elements it was supposed to protect are not being protected, are being eliminated, are being prevented, are being eroded.

I ask you to consider S. 1400, mark it up and pass it. Thank you.

[The statement follows:]

STATEMENT OF MALCOLM H. SKOLNICK, Ph.D., J.D.

Mr. Chairman and members of the Subcommittee, I am pleased to be able to appear today in support of S. 1400, the Product Liability Reform Act, because I and my colleagues in the scientific community have experienced first hand the harmful impact of product liability laws on scientific innovation and the transfer of new technology from the laboratory to the marketplace. I am a Professor of Biophysics at the University of Texas Health Science Center at Houston, and a registered patent attorney. My comments today reflect my experiences as a researcher in biophysics and neurophysiology, as a teacher of methods of health care technology assessment and my experiences helping others translate the results of research and development into innovative commercial products. My testimony reflects my own opinions and does not represent any position of the University of Texas.

The points I wish to make today are: (1) Product liability laws have a dysfunctional effect on biomedical research and practice because they militate against efforts to make America a safer and better place in which to work and live; (2) Product liability laws degrade our competitiveness in the global community by placing enormous burdens on American businesses who attempt to introduce innovative biomedical products into commerce; (3) Action at the Federal level is needed to re-establish a rational, predictable climate in which the government and the scientific and business communities can once again collaborate freely, without fear of excessive liability; and (4) Our citizens are some of the most gifted and industrious people in the world; help them flourish -- don't allow them to stagnate under product liability laws that punish them for their creativity.

The Collaborative Nature of Research and Innovation

Programs in biomedical research and the Health Sciences in the United States have traditionally been accomplished through a collaboration of government, academia and industry. Government sets national health priorities and encourages research initiatives in the academic and private sectors to accomplish these goals. In fact, government is the primary sponsor of most basic research conducted in this country.

Government also plays a regulatory role in the health sciences, setting standards for the safety and efficacy of biomedical research and technology. This is especially true in my area of expertise -- biomedical research aimed at developing new drugs and medical devices.

One of the greatest paradoxes that I and my colleagues must face is that complete compliance with government standards is meaningless as a defense under our product liability laws. All of the intelligence, knowledge, and expertise invested by both the government and the research community in biomedical product development counts for nothing because courts and juries, generally with little or no scientific background, can undermine the most rigorous scientific protocols and analyses, based solely on sympathy for an injured plaintiff. Thus, mere compliance with federal or state regulation does not preclude a jury from concluding that the product is unsafe, either because the design is defective or the warnings inadequate. Courts draw these conclusions even if FDA has mandated the precise language in the warning labels or has defined the exact procedures for making a product, such as a vaccine.

Even when state tort law recognizes that medical products that meet FDA or other federal regulatory requirements are not "defective" products for purposes of strict liability, plaintiffs have still been successful by asserting that FDA standards should be considered ineffective because they do not provide meaningful protection for the public in general, or the complaining plaintiff in particular. In these cases, the opinions of the scientists and physicians who provide FDA with information about the safety and efficacy of drugs or medical devices count for nothing -- turning the scientific method upside down.

The academic community is the primary source of fundamental research in the biomedical and health sciences. However, these researchers are dependent on support from external sources of funds, such as grants from government, private foundations and industry. Government support is oriented to basic research. Private foundations tend to target areas of special interest to them. Industry is the principal source of funds for applied research leading to commercial products. When any one part of this symbiotic process fails, it inevitably disables the remaining parts.

Another way in which our unpredictable product liability system works against product safety and improvement is by stopping the free exchange of scientific information about particular products. Once a biomedical product is on the market, manufacturers are required to report adverse reactions or untoward events involving their products to the FDA or other regulatory oversight agency. Reporting by manufacturers is never rewarded. Instead, the person or organization who was open and forthcoming when he submitted the report often must watch helplessly while the government allows plaintiffs' attorneys' access to the report. Thus, rather than encouraging a free and frequent exchange of information, in the hope of improving product safety, the information may ultimately be used to argue that the product is defective.

While the public must not be foreclosed from access to information about risks, this public need must be balanced against the need to encourage a free flow of information that can be tested in the peer review process and used to develop effective health policies. The present system puts disproportionate emphasis on publicizing risk when the average layman doesn't understand that risk is a ubiquitous part of living. To the public, a risk is a failure or a fault. We need more evenhanded methods to balance risk, which is never completely controllable, with the benefits associated with new and innovative products.

The pernicious environment created by our product liability system has seriously eroded collaboration between government, industry and the academic communities in research, development, and production. Fear of potential liability, even from claims that are clearly without merit, has withered the willingness of industry to undertake the activities that translate research results into products that benefit the public, but which may entail some small degree of known risk. This fear causes:

* Reduction in industry funding of research;

- Reduction in licensing of research results for product development;
- Withholding or withdrawing products from the market;
- Movement of the company from the United States to a more favorable environment where the disadvantages of product liability laws are less severe.

The problem is most egregious in biomedical research leading to products used to diagnose or treat medical conditions. Venture capitalists look for medical devices that embody diagnostic or therapeutic breakthroughs; are more reliable or more compact; or that perform better or perform at a lower cost than existing products. An idea for a product that offers only small, incremental improvements to existing products or designs is not likely to be attractive to investors and consequently is less likely to be funded. This poses a dilemma under existing product liability laws because the more different a new product is from the existing products it may replace, the more risk it may entail. If the idea is completely new and represents a departure from existing practice, the risk is even greater.

Because of the rapid pace of science, the benefits of a new product are always mixed with some degree of risk. New product designs are easier to attack and the knowledge base for new ideas is at the beginning stage of development. A developer can make good faith efforts to comply with governmental regulations, check and test his design thoroughly, provide safety advisories that reflect all applicable scientific knowledge at the time the product is introduced and still face potential liability. We have already commented on the courts' willingness to ignore federal regulatory findings about safety and efficacy. Even more damaging is the facile way the judiciary extend strict liability to find products defective simply because they fail to perform as safely as the user expects, or because the defendant cannot prove to a jury that the benefits of the design outweigh the risk.

In addition to the inconsistency in use of legal theories there is wild disparity in the level of awards given to plaintiffs. This is exacerbated when punitive damages are involved. The size of awards depends as much on when the action was filed and where the case was brought as upon the merit of the victim's claim. This disparity has at least part of its origin in the drastic difference between the scientific and technical burdens of plaintiff and defendant. The plaintiff has been injured because of use or exposure to the defendant's product. The product may have been misapplied by a physician, dentist or other intermediary, the product may have aged, the plaintiff may have disregarded or misinterpreted warnings about the product. No matter; the plaintiff may be compensated by merely crying foul. If the case goes to court, the plaintiff need only present himself and his arguments connecting him and the product. The manufacturer must go to much greater scientific and legal lengths to show the soundness of his design or his good faith in keeping his duty to warn of known dangers.

Even if the producer followed all the rules applicable when the product was made, his product still may be determined unsafe in light of our present knowledge about that product. It is one issue when a producer is accused of negligence and is on trial for his error. Juries have demonstrated their insightfulness and ability to handle the issues surrounding the human error in negligence. It is a more difficult issue when the product is put on trial under strict liability. Juries are increasingly unable to cope with the scientific and technical issues permeating the arguments.

The consequence of this catalog of inequities is that producers view the product liability system as capricious, unfair and unpredictable. In the area of health related products, valuable innovations have been lost, delayed, ignored and withdrawn. Examples may be taken across the spectrum of biomedical activity. I would like to offer examples from my own experience and that of my colleagues that illustrate the disadvantages and disincentives spread by the product liability system.

* * *

New Drug Development

Cardiovascular research is a strong element in my environment. One of my former graduate students is now a cardiologist in the University of Texas Medical School. We have discussed the growing liability problems in using anti-blood clotting agents to treat heart attacks. A heart attack usually occurs when a blood clot gets stuck in the arteries feeding the heart. Within a few hours, the section of heart muscle not receiving a sufficient blood supply dies. Drugs which block formation of or dissolve blood clots, are effective in saving lives of heart attack victims. If given quickly, the drugs, known as thrombolytic agents, can dissolve the clot, preventing most of the damage. These new drugs can literally stop a heart attack if given within a few hours after the start of chest pains and other symptoms. Studies have shown that the treatment typically has reduced the heart attack death rate from 12 percent to 6 percent, a 50 percent saving of mortality.

But because the therapy interferes with the body's normal capacity to form blood clots, the treatment can trigger a major side effect; unwanted bleeding. This bleeding can be controlled in most parts of the body, but if a blood vessel in the brain ruptures, there is nothing physicians can do to stem the outpouring of blood. The result is often a crippling or fatal stroke. The rate of occurrence of such strokes is one-half percent in the population treated, approximately one in 200 patients.

Fear of suit from the victim of a stroke by these types of drugs affects physicians' choice of therapy for heart attack victims. Thus, many patients may be denied the new life-saving treatment because doctors and the drug manufacturers fear being sued in the event of a stroke. The equally unappealing inverse of this issue is the possibility of medical malpractice claims if doctors do not employ the drug in therapy.

* * *

Surgical Implants

Houston is the home of an innovative medical device company, Vitek, which produces and sells temporomandibular joint implants. The President of Vitek is a friend who has related some of his frustration and discomfiture with the product liability system. The temporomandibular joints (TMJ) are the hinges of the jaw. Like the rest of nature's engineering, this joint is a marvel of design and operating efficiency. It is subject to enormous forces and required to support a wide diversity in ranges of motion. The joint, like the rest of the body, is subject to disease and normal and abnormal wear. Arthritis and stress are TMJ's enemies. Grinding and gnashing of teeth, especially during sleep cause TMJ degeneration. This in turn affects facial nerves in the area and can lead to excruciating pain.

Medical science has developed a TMJ replacement that may be surgically implanted. It is not as good as the original but as a replacement gives relief from the pain and enables reasonably normal chewing and talking. This implant is now the subject of litigation because patients' who gnash or grind their teeth after an implant can have tissue damage because of degeneration around the implant caused by the gnashing or grinding. Similar suits have arisen because the implant may not be effective if the patient is not treated properly or is not compliant with treatment recommendations.

This device is hostage to the skill of the implanting surgeon. This skill varies widely in the field. The patient served by a less skillful or practiced surgeon, and who becomes dissatisfied, can sue the surgeon in malpractice (negligence) and the manufacturer on a product liability theory. The same is true of patients who have behavioral problems that put them at greater risk of implant failure. Even when these patients have been advised of the risk that their teeth grinding poses for success of the implant, they have requested the surgery and later sued when the predicted failure occurred.

The manufacturer is unable to sell his product only to skillful doctors or to low-risk patients because that information is generally not available to the manufacturer. The product liability system focuses on the failures and not the successes. Of 26,000 implants to date, 200 suits are now active or pending. The damage awards possible in these suits in the present climate may be enough to drive the manufacturer out of the market or at least out of the United States.

One of these suits is particularly egregious and illustrates the deleterious effect of the product liability climate on the manufacturer and his insurers. A surgeon who had been sued had claimed that the patient's continuing problems were caused by the poor design of the implant and not by his treatment. This suit on implant failure was actually dismissed before trial. When the manufacturer examined the patient in pre-trial discovery he learned there was no implant in place. It cost the manufacturer $50,000 to reach that point. His insurance company elected not to pursue the fraudulent surgeon and thereafter raised the manufacturer's rates for liability coverage.

There are now approximately 1000 implants performed per year in the United States. There is no other treatment for these sufferers of TMJ syndrome that is as effective. If this manufacturer is forced out of the market, these patients will have no recourse. The market is not large enough to attract the interest of a company large enough to be a self-insurer.

In contemplating his company's survival, the manufacturer has noted that in England he may purchase £1,000,000 of liability coverage in the United Kingdom for £173. If he elects to continue supplying the United States, the cost of the same coverage rises to £100,000.

* * *

Diagnostic and Therapeutic Software

Most universities operate technology transfer offices, and ours is no exception. We are also like other universities in that we have experienced product liability problems that have inhibited our licensing efforts. Computer control of medical devices can provide greater accuracy and continuity of performance. Development of controlling software requires thorough understanding of the process to be managed and complete consideration of all the variables involved. Successes of this endeavor are taken for granted. Failures generate lawsuits.

University researchers have developed a computer controlled pump for medication. The drug to be delivered is cyclosporin to be used in immuno-suppression therapy for transplant recipients. The computer controlled pump provides a more even supply of the drug with increased benefit to the patient.

The researchers assigned their invention to the University where I work; the University licensed the invention to a manufacturer. Both the researchers and the University were pleased to believed that what was considered a medical benefit would soon be in distribution and assisting patients. Unfortunately, the manufacturer has not seen fit to exercise his license. Even though the drug involved has been FDA approved, the manufacturer is fearful of possible suit because of examples he has seen in other areas where computer controlled devices have been attacked because of the different nature of their operating principles.

* * *

Identifying Risks from Environmental Chemicals

Operators of grain elevators employ chemical fumigants to protect the grain in storage. One such fumigant, phosphine, is released when Aluminum phosphide pellets interact with the moisture in the air. Phosphine in heavy exposures has been known to cause sever, immediate effects including lung irritation, depression of the central nervous system and damage to the liver and other organs. Recently, a study has shown that grain millers exposed to phosphine and other fumigants showed a significant increase in cancers of the blood producing system. These cancers were correlated with detected genetic translocations in the exposed workers' DNA. Until these recent research findings, it has been believed that low exposure levels of phosphine did not pose any long term or chronic health threat.

The scientists who conducted the original study negotiated with another grain facility, the Houston Port Authority, who use phosphine to extend the study of the risk to workers due to phosphine exposure. The Port Authority inquired about the determination of the indicia of risk. These are the detection of the genetic translocations. The Port Authority asked about other causes of such translocations. There are many -- including other environmental chemicals. The facility asked if the detected translocations could be solely imputed to phosphine. They can not.

At this point the facility opted to forego the study and concentrate on even more energetic efforts to prevent worker exposure to the fumigant. Their reasons were twofold: they could not allow continuing exposure to the fumigant once they knew it might be a risk; second, permitting the study exposed them to liability, especially under the product liability doctrines applied in their state courts, as long as there was even a remote chance that exposure to phosphine might cause the translocations leading to cancer. I have spoken with scientists, attorneys and spokespeople at the Port Authority proposing the study. They all express regret that the threat of liability prevents further discussion of the study and that it is not feasible given the vigorous effects of the Port Authority to assure worker protection.

* * *

Treatment for Drug Addiction

For the last six years the major part of my own research has centered on the investigation of the effects of low current, trans-cranial electrostimulation (TE). My colleagues and I have found a set of parameters defining an electrical signal that may be delivered to subjects through electrodes attached to the ears or other areas of the skin as long as the electrodes are on opposite sides of the head. The level of the current in the signal is so low that the subject cannot feel it, but the current nonetheless stimulates chemical activity in certain parts of the brain. The chemicals involved include the enkephalins and endorphins, the body's own opiates made in the brain itself.

We have tested this treatment to alleviate chronic pain, to assist people in quitting smoking and to reduce the severity of opiate withdrawal syndrome. It was in this last area where we obtained our most significant results. The experiments were performed first in animals who had been addicted to morphine. A controlled experiment was performed comparing symptoms in withdrawing animals which received the treatment and withdrawing animals with electrodes attached but with no current. The treated animal exhibited many fewer signs of withdrawal.

We then attempted to schedule experiments with human subjects. We produced the animal data along with data from our clinical experiments in chronic pain and smoking cessation for the attending physicians and board of a neighboring hospital specializing in treatment of addictive disorders. We had received approval from the University's Institutional Review Board and the endorsement of the Hospital's physicians who were going to participate in the study with us. The hospital's board, advised by its attorney, delayed approval on the basis that the treatment was new, experimental in nature and might cause side effects which might expose the hospital to liability.

We eventually secured the board's approval but the delay had compromised our progress so much that our sponsor elected to discontinue the project and pursue it elsewhere.

The examples I have described illustrate the destructive characteristics of the present product liability system:

> Scientific inquiry is stifled. Ideas in areas where litigation has occurred will not receive support for exploration and development. Producers fearful of possible suit will discourage additional investigation which might discover additional knowledge which can be used against them in future claims.
>
> Health care providers are sandwiched between the rock of malpractice for not employing a product with a known benefit and the hard place where

product liability suits await the provider whose patient encounters the product's risk.

The risk/benefit balance used in product evaluation is not working. The costs for encountering risk overwhelm the benefits. One bad occurrence, as simple as the threat of suit, is enough to load the litigative gun and drive insurance costs to unaffordability leaving a producer with the prospect of gambling his business in economic russian roulette.

The credibility of regulatory law is diluted. The product liability system leads lay juries to question and ignore the scientific findings of government scientists.

* * *

The provisions of the bill before you can substantially relieve the anti-competitive and antagonistic character of the product liability system and return some sense of balance and fairness in the law. This reversal is necessary if we hope to reward innovation instead of punishing it because the penalty for failure or fault is judged by today's knowledge rather than by what was known at the time the product was created.

We cannot expect to retain our small businesses and their energizing entrepreneurs if we continue to allow one bad occurrence to destroy the rewards from all the other good and useful results a producer has obtained. Social responsibility requires protection of citizens from unnecessary harm and compensation of individuals wrongfully injured, but there is an equal responsibility to protect manufacturers from unjustified liability when, using the best available knowledge, they develop products that, although not entirely risk-free, offer significant benefits to society as a whole. The working mechanics of the present product liability system keep ideas from being developed, from making the transition from laboratory to the market. The system drives useful products from the market because of its disproportionate emphasis on providing compensation to the victim in each case with insufficient regard for those who have already benefited from the product's use or those who may be deprived of such use if the product is withdrawn because of the taint of future liability.

The effects of the product liability system do not stop at stifling competition and inflating costs. The negative values in the system have begun to fray our social fabric and respect for the rule of law.

In the product liability system, science is overcome by emotion. Responsibility is displaced by dependence. The value of legal precedent embodied in the doctrine of stare decisis is degraded by inconsistent theories and untoward variance in awards. Apart from the cases where plaintiffs have been injured by clear faulty manufacturing practice or there is a real failure to warn, our judges are reduced to finding ways to have producers pay for consumer's bad luck, lack of skill or carelessness.

The foundation of our nation's uniqueness rests on independence, creativity and self-reliance. The present product liability system is working a corrosive effect on these values that you can reverse.

> The cornerstone of the law embodied in precedential consistency is being worn away by inconsistent holdings and incomprehensible differences in awards across state jurisdictions.
>
> Business cannot predict or plan for the uneven and damaging effects of product liability. Without the ability to predict and plan, business cannot compete.

These examples represent my exposure to the nature and size of the problem in the product liability system. The committee could sample other researchers and find parallel experiences. The same can be said for those working to transfer biomedical research into technology for health care. I hope the committee will recognize the examples I have presented as representative of the magnitude of the problem rather than isolated anecdotes.

I hope this testimony can assist you in passing this bill to help reverse the erosion the product liability system has wrought on innovation in science and industry. Thank you for the opportunity.

Senator **Bryan**. Thank you very much, Dr. Skolnick.

Mr. Kimmelman, we will now hear from you, sir.

STATEMENT OF GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. **Kimmelman**. Thank you, Mr. Chairman. On behalf of the Consumer Federation, I appreciate the opportunity to testify today in opposition to S. 1400.

On purpose, I sat in Secretary Mosbacher's seat so to assure him and you that I have no greater affinity to lawyers than he, himself, does. Recently a former Senate Commerce Committee staffer on the Democratic side, after having seen me come up and testify twice in a row as lead supporters of bills introduced by Senators Danforth and McCain, questioned whether CFA had become a Republican organization. I can assure you we have not, but we try to be fair on all the issues we deal with. Because of that, I would like to focus your attention on what we think are some of the bigger picture problems in product liability from a consumer perspective.

Not looking at anecdotes but nationwide data, overall trends, we think the product liability system has been working fine to promote American competitiveness by signaling to manufacturers the need to make better and safer products, a signal which we believe has been received by the manufacturing community as product quality has improved over the last 20 years and which we think the data show translates into fewer deaths and injuries caused by products.

In simple terms, we believe the product liability system piggybacks on the marketplace, rewarding the makers of safer products and penalizing those who make defective products, whether they are domestic manufacturers or foreign manufacturers going under the same rules in the American marketplace.

We have heard a lot of anecdotes this morning. I would like to get back to some of them later. I want to look at the broader trends. In the last 20 years in the era of strict product liability under State law, we have seen the corporate structure in America change dramatically. Data reflecting surveys of top corporations show that the product safety function in a corporation, management positions, positions to look at product safety, was found in a small minority of firms in the early 1970's. Only 20 percent of large companies had that. By the end of the 1970's, virtually all companies had a very strong product safety function in their management structure.

Now this translated into better products, and we know it from consumers. Survey after survey of consumers in the last 20 years shows greater satisfaction with product quality and product safety.

Most importantly, we see a dramatic change in the rate of accidental injuries and deaths in the American society. We see a change in rates that is so dramatic that we believe approximately 6,000 deaths and millions of injuries have been prevented on an annual basis now because of product liability and other forces towards greater safety in our society. This has been achieved at dramatically low cost when looked at from a broad societal perspective. Less than 1 percent of gross business receipts goes into insurance costs.

There has been very little impact on product prices for the consumers, and this importantly has been stable in relationship to gross national product over time—1 percent in that area in the 1980s, 1970s, 1960s, 1950s and 1940s. That is all liability has cost in societal terms.

Secretary Mosbacher cited figures on Federal court filings and State court filings. Those are not full statistics. We only lead you to the General Accounting Office statistics and the Rand Corporation statistics to show that they are much lower, a very stable trend in lawsuits.

Now I think it is important to put the claims you have heard this morning in perspective. In real simple terms, for a business there is no question about the fact that less liability means saving money. That is what they hope—more money in their pockets. Interestingly, the insurance industry says S. 1400 will not save that money; nonetheless, the strong desire on the part of businesses seems to be to try save money one way or another.

With this in mind, it is not hard to understand why you are not hearing from business about other factors that go into whether a product gets marketed, why a product comes to market. We want you to look at all the facts. For example, we have heard about small aircraft. Well, it happens that there was a glut in small aircraft with overproduction in the 1970s. Older aircraft are lasting longer. They are flying better than people thought. Is that a contributor to a problem in the general aviation industry? It appears to be so from many independent sources.

The portable kidney dialysis machine, I know something about this because my father was on kidney dialysis. There are tremendous dangers with kidney dialysis. It requires a lot of medical oversight. There is tremendous cost in these portable machines and the centrally-located machines in general. It may be economically more efficient to centralize kidney dialysis operations. Is it economic and high risk factors that are slowing this product to market?

The same goes for other products. We urge you to get all the facts. From the consumer perspective it seems illogical that a manufacturer that can come to market with a better, safer product that in the long run will capture market share and face fewer lawsuits would refuse to do so.

The only reason we can understand that they may not do so is a finding that we believe comes out of the OTA study which indicates possibly too much reliance on short-term profit over long-term gain for society. A concern that retooling, putting money down now will cut profits in the short term rather than looking to the long-term benefits for society of going forward with new products. If this is so, we believe it is the corporate mentality that needs to change, not the liability system.

We believe that broad data that we have provided for the committee refutes the claim that product liability works against product improvement. On the contrary, we think it promotes product safety and sends the right signal to American manufacturers.

What more could promote American competitiveness than pressuring U.S. companies to respond to consumer demand for safer products and better products and force foreign companies to live up to our standards under the risk of lawsuit in American courts?

What could better serve U.S. interests than in a product liability system that reinforces the U.S. interest in telling foreign consumers that if they buy American products they are buying quality?

In conclusion, Mr. Chairman, we urge you to reject S. 1400 because we believe it is unfair, it is anticonsumer and could undermine the procompetitive attributes of our current product liability law.

Thank you.

[The statement follows:]

Statement of Gene Kimmelman

The Consumer Federation of America (CFA) believes that state product liability law, working in conjunction with market forces and government regulation, has helped American business improve its competitiveness by responding to consumer demand for safe, high quality products. Rather than address the real economic problems related to fluctuating insurance prices (i.e., the insurance cycle), S. 1400, the "Product Liability Reform Act," introduced by Senator Kasten, would harm consumers by reducing manufacturers' incentives to produce better products.

State product liability law has developed, over time, in tandem with a dramatic increase in public concern for product safety and quality. As the attached report demonstrates (see Appendix at 20), the implementation of strict product liability starting in the 1970s, along with the creation of numerous federal safety regulatory agencies, has contributed to a dramatic decline in accidental deaths and injuries among American consumers. The public has consistently registered strong support for this trend over the last 15 years, indicating consumer perception of improved product quality (Appendix A at 13).

Most significantly, American manufacturers have responded to consumer demand and the safety incentives of the tort system to improve their products. Since the early 1970s, corporate interest in product safety has skyrocketed as evidenced by the creation of formal product safety functions in the product-production process (Appendix at 3-8). For example, a Conference Board survey of 300 large corporations found that while two-thirds of the firms had no formal product safety function in 1971, by 1978 80 percent had developed a comprehensive safety review process. A 1988 survey of executives in pharmaceutical, chemical, semi-conductor, and small manufacturing firms concluded, "The focus groups as well as the individual interviews all suggested that corporations currently pay more attention to product safety, both in introducing new products and in considering the acquisition of new firms."[1]

In other words, the marketplace has been working just as it should. As American consumers demand better and safer products, American manufactures have responded appropriately, and state product liability law has evolved to reward manufacturers who improve their products and penalize those who market defective products. A leading insurance broker recently recognized the positive interaction between the courts and manufacturers: "Risk managers became more pro-active in presenting their defenses and adopting safer procedures that have been recognized by the courts. Every time there was an award, lawyers noticed what the arguments were and the points that went against them. There are much broader warnings now on products and more concern over making employees know the dangers of the products."[2]

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[1] Rand Corporation, Institute for Civil Justice, The Economic Consequences of Expanded Corporate Liability: An Exploratory Study (1988).

These market forces put American business in a perfect position to compete head-to-head with foreign enterprises. Foreign manufacturers must satisfy the American consumers' taste for high quality, safe products or face the "penalties" of product liability lawsuits in American courts for marketing defective products. American firms, competing abroad, enter foreign markets having been disciplined by American consumers' desire for quality at a competitive price. This should serve American interests well, to the extent that quality sells as well abroad as at home.

These fair market conditions have been obtained at a reasonable cost to American business. According to the General Accounting Office (GAO), insurance premiums for all types of liability coverage represent well under one percent of gross receipts for large businesses and only 1.2% for small businesses. These costs represent neither a threat to business viability nor to competitive prices for goods and services.[3] The GAO also found that, but for Dalkon Shield and asbestos claims, since 1981 federal court filings for product liability cases have not increased.4 Finally, the author of a recent Rand Corporation report found "that the available evidence doesn't support the notion that product liability is crippling American business."5

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[2] "Liability Crisis Fades But Problems Remain," Journal of Commerce (December 6, 1989).

[3] United States General Accounting Office, Liability Insurance: Effect of recent "crisis" on business and other organizations 1988.

Nor have American consumers paid an undue price for the increase in safety and quality. The cost of liability insurance simply is not large enough to affect product prices. And despite subjective impressions and isolated instances to the contrary, liability concerns have not left American consumers without access to new or existing products. The Rand Corporation survey of large and small manufacturing firms concluded, "Curiously, the focus groups yielded few instances in which products available in other nations have not yet been made available here by virtue of liability concerns .... apart from Bendectin, no one can offer an example of a major product withheld solely from the United States market as a result of liability concerns."6 Indeed, the Pharmaceutical Manufacturers Association, the trade association for an industry frequently pointed to as particularly hamstrung by liability issues, has proclaimed its advances in product research and development in a series of full-page advertisements

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[4] United States General Accounting Office, Product Liability Extent of "Litigation Explosion" in Federal Courts Questioned 1988.

[5] The Rand Corporation, Institute for Civil Justice, Product Liability and the Business Sector, 1988.

[6] Rand Corporation, Institute for Civil Justice, The Economic Consequences of Expanded Corporate Liability: An Exploratory Study (1988).

entitled Innovation in Medicines. Number 8 in the series declared in its headline: "U.S. Leads in Discovery of 'World Class' Drugs," and the text stated that "nearly half of the new medicines that achieved world-wide acceptance over a twelve-year period (1975-1986) originated in the United States."

As we brought to the Senate's attention last year, the predominant business problems in our marketplace involve cyclical fluctuations in the insurance industry that are not addressed in S.1400.[7] In fact, no one appears to be addressing the insurance pricing cycle. A 1990 analysis of the property/casualty industry noted with bemusement, "Like the weather, everyone talks about the causes of cyclicality, but nobody can (or will) do anything about it."[8]

Unfortunately, S.1400 would weaken the positive safety incentives of state product liability law by favoring manufacturers at the expense of innocent consumers injured by defective products.

CFA therefore urges you to reject S.1400 and preserve American competitiveness by allowing state product liability law to continue promoting the manufacture of high quality, safe products.

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[7] Letter from CFA, Consumers Union, Public Citizen, and U.S. Public Interest Research Group to all Senators concerning S.1400, May 17, 1989.

[8] A.M. Best Co., "Review and Preview: 1989 and 1990," Best's Insurance Management Reports (January 2, 1990).

Senator **Bryan**. Thank you very much. Let me begin with you. It is clear from your testimony and clear from the written statement you submitted that you are opposed to S. 1400. Assuming without conceding that S. 1400 is not the answer, is there a problem out there? These gentlemen have spoken with some passion and conviction that case after case after case has either denied the American public access to new technology, new product.

Are they misinformed, or are they just interpreting the data wrong, or is there no problem out there?

Mr. **Kimmelman**. We think that the overall data shows that we are getting better, safer products on our market.

Senator **Bryan**. Let us assume that that is true.

Mr. **Kimmelman**. The question is what products are not coming to market? We think we need to look at broader information. Are these riskier products? Is the substitute for asbestos safer than asbestos? We have not seen data that supports that. As a matter of fact, there is testimony which you will receive later about biodegradability of a substitute. Well, asbestos is biodegradable, too. It is still extremely dangerous.

Is it only risky products, dangerous products that we are keeping from market? If so, that may be better for consumers. We are slowing down the development of products that have problems. So we do not see a problem in general with what is coming to market. Today's products seem to be of better quality. The consumer likes them better, and management of corporations seems to have gotten the signal.

Now are there things that could be improved in the system? Certainly. We have supported alternative dispute resolution before, and we believe it is an appropriate legislative matter. We think there are some problems with the provision in the bill, but that can be improved.

We think getting speedy compensation to those who are injured out of no fault of their own is a laudable goal. Reducing the amount of money going into the hands of lawyers is a laudable goal, and we support those types of efforts. We just do not see the need for some of the restrictions on consumers' rights that are in this legislation.

Senator **Bryan**. Mr. Featherstone, one of the cases that you cited in your prepared testimony was the IUD, the *Searle* case. In your testimony you indicate that this was a product that was safe and was removed from the market. The court in one of the cases in which this product was taken to court concluded that the evidence that was submitted to the jury would permit them to reasonably conclude that the defendant, G.D. Searle & Co. knowingly placed millions of American women, especially nulliparous women, whatever that means, at risk of serious infection, loss of fertility and surgery for removal of internal organs. It further said that the jury could reasonably conclude that responsibility for this conduct was shared throughout the defendant's hierarchy and that that conduct continued for over 10 years.

I do not know anything about this case other than I am just reading the decision of the court cited in 707 F. Supp. 1517, decided in 1989, but it does at least suggest to me that some of the anecdotal evidence that we are asked to consider is subject to a different interpretation.

Would you share your response to that with us, because if the court is correct, and I do not know whether they are, this course of conduct can hardly be considered safe, and the recovery of a judgment does not appear to be out of line if, again, the court's conclusion is correct with respect to the evidence.

Mr. **Featherstone**. Well, I cannot argue the court decision. I really do not know the case that well. I can tell you that after 45 years of manufacturing, 17 years in automotive and developing a lot of products myself, there are wrong judgments made, and there are a few products that get to the market that are bad. I am the first one to say that this happens, and those people have to be taken care of. I firmly believe that.

I am one of them myself. In 1933 I jumped out of a barn roof with an umbrella, and the umbrella went up and I went down. After 36 operations I am here with you. I suppose I could have sued the umbrella guy. I do not know.

I would tell you that things slip. I would say that we have the highest quality people in the world, and I believe that. It is very difficult to supply the Japanese and these people. Some of this came up today, and I will get to your point. They work in Ohio with a lot of Japanese manufacturers. They brought them over here, and for us to work with them is extremely difficult because our attorneys get into it, whereas the Japanese do not have attorneys getting into it. They just work with each other, and we have not yet learned that.

I have no doubt that there are things that get through the corporate hierarchy. I have no doubt in my operation that somebody could find somebody that did something wrong. I just know people that well. I also know that in our infinite wisdom I can go to jail about 80 ways in case somebody in the plant says something wrong. So it is interesting to try to stop all these things.

I will tell you this. Our 300 people never intentionally made a bad product to hurt anybody in their lifetimes. I have had people there for 35 years coming to work every day scared for their job because of this, and, believe me, they do not go out and machine something incorrectly so that it will hurt somebody.

Senator **Bryan**. Mr. Featherstone, I am sure that that is true.

Mr. **Featherstone**. You understand.

Senator **Bryan**. I am sure that that is true, but let me ask you. Let us not take your company because I do not want to personalize it, and I certainly do not quarrel with your efforts to keep your company on. I frankly admire your spirit that you think that our workers are as good as any workers in the world and that you turn out a quality product that equals or surpasses anything in the world. That makes me, at least vicariously feel very proud, of what you folks are doing, although I do not know the details.

Let us assume in another company for the sake of argument that nobody intentionally tries to hurt anybody. Yet, during the course of the process a product is made that is defective and somebody gets hurt, somebody who has not misused or abused the product in any way.

Should the tort liability system in America permit that individual to recover because of his or her injuries even though there has been no intentional misconduct on the part of the manufacturer or his or her employees?

Mr. **FEATHERSTONE**. I feel very definitely that the person should recover, and instead of 76 percent going to the attorneys I think 100 percent should go to the person.

Senator **BRYAN**. I appreciate that.

Dr. Skolnick, my time is running out, but I would ask you one question. You have obviously given a great deal of thought to this. There is going to be testimony in the next panel that if we adopt S. 1400 as submitted it will not change the cost of insurance premiums, that there can be no assurance that it will even be reduced in a de minimis amount.

If that is a correct analysis, and I claim no expertise in insurance risk evaluation, what is the argument to adopt S. 1400? Are we just spinning our wheels, or does it really do anything? There is nothing in this legislation as I read it that would prohibit anyone from suing. Any one can sue, irrespective of the merit of the lawsuit. That is not precluded in this piece of legislation. Why should we pass it if that is true, if all these crazy claims can be filed and insurance premiums are not going to go down?

Dr. **SKOLNICK**. Mr. Chairman, there is a tremendous amount of inertia in any large system, especially one that has affected so many components. As a physicist, I know that denying effects of inertia is foolhardy. I believe you have to live with inertia in systems, and that it is part of the checks and balances in this process.

S. 1400 is a marvelous first step. It does not redress all the grievances. It does not provide for all contingencies. It will not solve all the problems, but it does make a beginning in providing some kind of uniformity in the product liability system.

I think one of the most important words that Mr. Kimmelman said was "illogical". The view of the tort liability system on the part of business and academia and even some parts of government is that it is illogical. It does things that are inconsistent, that do not make sense. It turns science on its head. It replaces science with emotion. That is okay. We need to have both kinds of reflections in our system, but there is an overbalance now. S. 1400 helps to redress that.

In this regard, it is interesting to note the confluence between product liability and medical malpractice. In the example I gave about the bloodclotting agents, I know physicians who are equally fearful about using them and not using them. If physicians do use these agents, they can get sued in product liability and along with the manufacturer. If they do not use them, because studies show the agents are effective in reducing heart attack severity, the physicians can get sued for malpractice.

Senator **BRYAN**. Hobson's choice, yes.

Dr. **SKOLNICK**. Yes. Courts dictating the practice of medicine, may serve a useful purpose as a possible check on malpractice, which certainly does occur, but the system has gotten out of control. Bounds need to be established. The only way that can happen is if the Federal Government, you and your colleagues, take some action. This bill is a first step to do that.

Senator **Bryan**. I thank you very much for your testimony, Dr. Skolnick and other members of the panel.

I defer now to Senator Kasten for a round.

Senator **Kasten**. Mr. Chairman, thank you.

First of all, Mr. Chairman, I would like to submit for the record a statement of Professor Michael Porter of Harvard Business School who also has just completed a major work on competitiveness which is going to come out this month in a book called "The Competitive Advantage of Nations". I just want to pick one quote from that statement.

"Liability law as it is now structured causes companies to slow the rate of innovation. Because product innovation is central to maintaining and improving competitiveness and because product liability is an externality that the government alone can change, government reform of U.S. product liability laws would be an appropriate procompetition action."

I would also like, Mr. Chairman, to submit for reference at this point a Law Review article authored by Alfred Cortese and Kathleen Blane soon to appear in the University of Pittsburgh "Journal of Law and Commerce", Volume 9, Issue 2, 1990.

Mr. Chairman, I am not going to go through a whole series of questions about the assumptions that were made in the OTA testimony, et cetera. Frankly, I think that all we can say about that is that much of what is written in the OTA testimony is correct. It is unfortunate that they did not focus on an additional problem with regard to competitiveness. We have a number of people and a number of experts who are just as expert as the people involved in the OTA study who have recognized the importance, as did Secretary Mosbacher, of product liability problems.

Mr. Kimmelman, you have testified before this committee a number of times on this and similar legislation. Some years ago you agreed with us that having one set of product liability rules so that consumers would know their rights and manufacturers would at least have some idea of their obligations would be correct. In other words, you testified in favor of a uniform standard for all 50 States.

Is that still your position?

Mr. **Kimmelman**. Senator Kasten, we have always said that we are basically indifferent as to whether it is State or Federal law in this area. The question is whether it is fair law, whether it is the right rules for consumers. So if Congress would be inclined to pass something that we think is fair for consumers, we would be very supportive of that.

Senator **Kasten**. You said that in a number of different ways, and today you said we do not think it is tilting the right way, obviously. Dr. Skolnick's testimony, I think, clearly shows that we have a problem here. I think increasingly consumers are going to recognize the kinds of problems that Dr. Skolnick has so aptly stated, particularly in medicine.

We also have the problem of the new improved product, of the product that is being kept off the market, the Ruger pistol example that I used. The safety was better, and we want people to make better products. I think increasingly we are going to have consumers recognizing that we do not want to have impediments to putting products on the market.

I just want to note some of the changes that we have made working with you and others:

All limits on damages have now been removed;

An expedited claims system has been added, and you are in favor of expedited claims systems;

Compliance with standards defenses for compensatory damages have been removed, an issue that we have discussed which was contentious;

Rules that would reduce a worker's right to recover based on employer fault have been deleted;

Rules eliminating collateral estoppel have been removed;

The requirement that the plaintiff prove negligence, a major demand of the manufacturers, was deleted;

Proposals to abolish joint and several liability were abandoned, and we now have a middle ground position similar to the position that has been taken in California with regard to punitive damage as opposed to others.

The point I want to make to you is that this process is one in which we are now involved very directly. I know that you do not agree with every single part, but at one point I believe that the consumer organizations are no longer going to be able to front for the trial lawyers and are going to have to be out on their own. At one point we have to separate that link. Just as we have separated the lawyers from the trial lawyers, we are going to make it possible. Now we might not be there in your view, but I know the private positions through discussions I have had with a number of people who are close to the consumer movement understand that up against the problems that Dr. Skolnick is talking about, more and more you are getting boxed in.

Look at what happened, for example, with regard to the DPT shots that I talked about. There is an example in which people were doing it. The problem in that case, Mr. Chairman, is we need to have some kind of a compensation system. In that area, you asked the question about a product in which the manufacturer did not believe he did anything wrong.

That is not the standard. In our product-liability legislation S. 1400, you do not have to believe you did nothing wrong. You have to prove you did nothing wrong. We are not in any way trying to limit people's ability to collect damages and awards when they are injured.

The real problem for our society is that DPT example. It just happens that out of several million, one reaction goes bad. Out of five people manufacturing it, we now have one; the cost has gone from $2.80 to $11.40.

Our society has to recognize that for that last person to go out and no longer give DPT shots is absolutely senseless. We need to have a compensation system that does not punish Lederle, that when that one problem goes off we treat it like being hit by lightning or something else. It was no one's fault. The person does deserve compensation, but you do not penalize the manufacturer for that particular occurrence. He is making it as safe as he possibly can. It is an act of God, not a manufacturer's problem in that area.

We have to start to develop that kind of a defense, and I would hope that Mr. Kimmelman would be with us in that kind of an effort because he does not want to see the last maker of DPT shots go out of business. That is what is happening.

Mr. Featherstone, have you or your company declined to produce a particular product?

Senator **Rockefeller**. To bolster your point, I would be interested in Mr. Kimmelman's response to the DPT. Is it of no concern to him that that is now not on the market? I do not mean to interrupt your time, and I will take it from mine.

Senator **Kasten**. Fine. Go ahead and respond to the question.

Mr. **Kimmelman**. I would be happy to respond. Senator Rockefeller and Senator Kasten, we supported the childhood vaccine legislation that went through Congress a few years ago. And if that is not solving the problem, we think Congress should look at that again. It is definitely a concern.

There is a problem here of injuries, and we want to see a way that people who are injured, out of no fault of their own, are compensated. And that legislation was an effort to try to balance those concerns. If it is not working correctly, we think it is appropriate to look back at that.

But we definitely are interested in better medicine and better vaccines on the market. There is no question about that. We just do not believe in wholesale changes in the law, where we do not think there is data supporting it.

And I agree with what Senator Kasten said about the changes in his bill. There have been a number of changes made. We think probably three or four more and we are there, Senator Kasten. We are not nearly as far apart as we used to be.

But we just want to make sure this is a balanced process, based on accurate information.

One peculiar point that I think Dr. Skolnick made is that, in many instances, you can describe liability law as a perplexing situation. I think it is just life. If you do too little, you may be held responsible. If you do too much, you may be held responsible. That is usually the way things work in life, and that is the way things work in our legal system. And it is a balancing process.

Some think it maybe has gone too far one way. We believe it is a fair balance now. But that is not an unusual situation. I think that is a very logical and reasonable situation.

Senator **Kasten**. Mr. Chairman, could I just continue with one and a half questions of Mr. Featherstone?

Senator **Bryan**. Absolutely. Go ahead.

Senator **Kasten**. I appreciate that. That was helpful, Senator Rockefeller.

Mr. Featherstone, do you have examples of where you have decided not to produce a product, or whether you decided not to improve a product?

Mr. **Featherstone**. In 1985, we got rid of $4 million a year worth of parts that our attorney said could place us at risk, from the standpoint of joint and several, with other companies that we have made the print.

And we have a product that I am debating right now whether to bring to market or not. I am the chief inventor and discoverer and et cetera for the company when I am not fighting litigation.

And we have a product that looks to me like it is half the cost of the one I developed in 1978. It is much more versatile. It is a tremendous advance in this type of product. But my attorneys have told me that there are States that, if you produce a new product, your last product is now defective. That is hard to tell my people, but that is what they told me.

And so we are debating what to do with it. We do know we can take it to Europe and give it to those people, to England, and they will produce. But I would sure like to keep it in Orrville to hire people to produce it there.

And we have got about 6 to 8 months to make a decision on it. Yes, sir, we do have a product like that.

Senator **Kasten**. Let me just follow up, and you can possibly do this very quickly. I would like you to explain with a little more detail why recapitalization of your company was the necessary result of the joint and several liability settlement. I want you to condense that if you can, so that someone can understand how this actually works, and why a small businessman from Wisconsin calls this issue a survival issue.

Mr. **Featherstone**. I will try this. My attorneys get on my back, but I will talk to you, okay.

We were hit and lost our insurance. Everybody ran from us, as it says in the testimony. And we called our congressman, who happens to be an attorney, and he said, liquidate the company, get out. He said, they are going to get you. He said, it does not matter whether you are guilty or not, they are going to take everything you have got.

Now this is the family that owned the company.

I was second in command. And then the president died. And when this happened, I went to friends of mine in large law firms in Cleveland, and they said, Harry, why do not you chance an ESOP, he said, a 100 percent ESOP. And he said, at least you would have 300 people fighting with you to fight this thing.

Senator **Kasten**. You might want to clarify, an ESOP is an employee stock ownership plan.

Mr. **Featherstone**. Right.

So we had three banks loan us some money. We recapitalized and bought it from the owners, about 100 of the local community people, plus the family owned 60 percent of the place.

And we bought it with the idea that if we mortgaged everything we had, including our shoes and socks and desks and everything, that at least the trial attorneys would have a problem getting to us. And we have had that proven several times since, that that was true. That when they hear we are a ESOP and hear we are mortgaged to the hilt, that they—I cannot use the language they use with me, but it is like, we will forget you and we will go to the next party. All right.

So it has helped us.

We know that we are paying it off. We know we have passed three years of very tough payments on our huge leveraged buyout. We are trying to figure out what to do now for the next 4 years, when we will have it all paid off. Because then we will lose that coverage.

We do have insurance. We do know we are the best, Mr. Chairman. And we do know we are still going to be fighting, and we think we will win. If I have answered your question—I hope I have.

Senator **Kasten**. Mr. Chairman, thank you.

Senator **Bryan**. Thank you very much, Senator Kasten.

Senator Rockefeller.

Senator **Rockefeller**. Thank you, Mr. Chairman.

Mr. Kimmelman, one of the obvious phenomenon that has been taking place is that more and more American businesses are shifting their businesses overseas sometimes, to avoid liability costs that are here.

You may agree with that or not, but that I think is happening.

Does not that, in effect, make it a lot more difficult for the consumers that you represent to have a voice in product design and safety? Would it not be advantageous to consumers in fact to have a climate in this country that was more conducive to keeping manufacturing here, so that watchdog organizations like your own could watch more closely?

Mr. **Kimmelman**. Well, Senator Rockefeller, it certainly is advantageous to have a manufacturing base in this country, there is no question about it. But, in response to some of the claims made, we have been looking to see where there are American-made products that are marketed somewhere else before they are marketed here, or even foreign products that are marketed somewhere else before they are here. And we have only found one that is identified, and that is a special contraceptive in France.

We cannot seem to find others.

Now there may be a logic here that indicates where some people think trends are leading, but we have not seen that. And what we have been seeing is more foreign manufacturers coming and hiring American workers and manufacturing here under our liability rules in our climate, facing lawsuits here.

Senator **Rockefeller**. Well, let us turn to that if we can then for a moment. Because, obviously, that is true, and you do have many foreign companies coming in, and they are hiring American workers, and they are giving jobs.

But, again, a number of American companies that have discontinued certain product lines because of product liability costs. Many of these products are now made exclusively by foreign manufacturers in foreign countries and sold here.

Is not this switch harmful to the American consumers, because of the difficulties involved in suing a foreign company in the United States? And if I could finish my question, because it is sort of an A and B question.

And does not this concern you? Or, if it does not, should it not?

And even if a consumer is able to sue a foreign company in the United States, again, the whole principle being that we are shifting so much manufacturing overseas for a variety of reasons, of which product liability, in my judgment, is one very important one, is it not often very difficult for the consumer to actually obtain payment because these foreign companies often have very low, if any, cash reserves in the United States?

Mr. KIMMELMAN. Senator Rockefeller, I have certainly not heard of this problem from consumers. And in looking at the lawsuits, I have not found greater difficulty in recovering. Many of the foreign companies that are selling here are trying to expand their markets. They may not have all their corporate activities here, but they have significant assets here.

And I have not heard of a problem of inability to recover once judgment is rendered against these foreign companies.

There is no question about the fact that under our law, if they have any contacts at all, the most minimal contacts in this country, they can be sued in this country for injuries caused here. And so we have not seen a problem in having to go abroad to sue or work under other countries' legal rules in that respect.

Senator ROCKEFELLER. It is interesting, though, that you have seen no problems with them, but all kinds of problems with us.

Mr. KIMMELMAN. No, we do not see any problems with American manufacturers, because what we find is they are making better products. And, to the extent that there has been a problem that we have seen in American companies going offshore, going elsewhere, in every hearing I testify at, there is some other reason. It is the cost of labor. It is work environment.

There are always a litany of reasons. Product liability is mentioned as one, but, to me, we have not seen any direct evidence of this. Because the legal rules are quite clear, if you sell it here and someone is injured, if you are domestic or you are foreign, you can get sued here.

If it was such a beneficial environment in Japan or in Europe, why are products not coming onto their markets—made here, made there, made anywhere— first, if they are not going to get sued

there, made anywhere—first, if they are not going to get sued

Senator ROCKEFELLER. But if foreign companies have low cash reserves, which they tend to have here, does that not present a problem for the consumer if there might be such a suit?

Mr. KIMMELMAN. We would be happy to see, if the Congress were interested, in setting some minimum requirement for money available.

Senator ROCKEFELLER. But just answer my question.

Mr. KIMMELMAN. We have not seen it, Senator.

Senator ROCKEFELLER. Does not that present a problem?

Mr. KIMMELMAN. It could, Senator Rockefeller.

Senator ROCKEFELLER. Hypothetically, you do not worry about it?

Mr. KIMMELMAN. Theoretically it could, if there were some limit on what they paid out. But we have not seen that arise. I mean we have seen manufacturers trying to sell more and more in this country, and the assets are available in case those products are defective for those who are injured.

Senator ROCKEFELLER. I think you are sliding my question, but you are doing it effectively. Mr. Chairman, I hope you will bear with me for a moment.

Dr. Gorte, it is my understanding that the study that you undertook was asked for by banking and finance of the House, the Senate, et cetera, is that correct?

Dr. GORTE. That is correct.

Senator **Rockefeller**. And you examined four areas in your study, the first area was the matter of finance and investments. And the second area was increased cooperation between U.S. companies in order to share technology and information.

The third area involved the importance of establishing public and private institutions to enhance technology transfer, all on the mark. And then, finally, you addressed a variety of basic policy issues that the government must address to help businesses improve their competitiveness.

That is accurate, is it not?

Dr. **Gorte**. That is pretty close, yes.

Senator **Rockefeller**. And you also say that, despite the broad scope of your study, it does not exhaust the possibility for government actions to bolster the competitiveness of manufacturing? Did you not say that?

Dr. **Gorte**. Quite right, we are working on part three as we speak.

Senator **Rockefeller**. In fact, your office is already undertaking a study of competitiveness regarding drugs and biotechnology, is it not?

Dr. **Gorte**. That study has been going on for a couple of years. And I do not know what its due date is. But, yes, that is correct.

Senator **Rockefeller**. And I suppose that we could conclude then that there are a variety of issues related to competitiveness that are not yet fully addressed by your study?

Dr. **Gorte**. Right.

Senator **Rockefeller**. Each year the Commerce Department, Dr. Gorte, publishes a comprehensive study of over 350 industries, called The Industrial Outlook, and I am sure you are familiar with that.

In recent years, they have specifically identified U.S. product liability laws as having a negative effect on the competitiveness of U.S. businesses in the international economy.

Further, the survey has consistently shown that product liability problems exist in a broad spectrum of industries. The 1990 survey identifies the entire construction industry, for example, as an area where product liability effects have major competitiveness disadvantages.

And it goes on to say that relief in this industry depends largely on product liability reform. The Commerce survey also identified product liability as affecting all biotechnology, including products in industries such as pharmaceuticals, vaccines, medical devices, chemicals, pesticides, livestock production, and food processing.

Now, this is an area which you did not address in the report, but which you are currently studying?

Dr. **Gorte**. The Office of Technology Assessment is looking at that whole chemical industry, yes, pharmaceuticals, pesticides, et cetera. My study is not, because there is another study that is going on, on that. We are looking at manufacturing, yes, but we excluded pesticides and pharmaceuticals and the rest of the chemical industry because there was another study focusing on it.

And we are not looking at construction; that is not manufacturing.

Senator Rockefeller. I understand. But a lot of this that you are looking at, and a lot of it that others are looking at, and evidently, some of it you are looking at—you are looking, for example, at machine tools, as you indicated in your testimony.

Dr. Gorte. We did look at machine tools.

Senator Rockefeller. And aviation. You do say they experience competitiveness problems due to product liability in this country.

Now, when you sort of begin to put some of these different types of manufacturing together, are not you getting a fairly substantial spectrum of U.S. manufacturing industries?

Dr. Gorte. As I said in my testimony, Senator, it is not that we do not think that product liability is an important issue, we do, we have heard more about that from the aircraft industry than any other. We have heard some about it from machine tool makers.

But when we ask people what their major problems are, and we did a lot of study on electronics and telecommunications equipment, computers, semiconductors, and people like that, they never mentioned it.

So it is very spotty. We think it is important, it just does not seem to hit all industries.

Senator Rockefeller. But this Commerce Department survey looks at biotechnology, pharmaceuticals, vaccines, and a lot of others, and they conclude. You do not conclude, but you do admit that there would be areas that you have not yet investigated?

Dr. Gorte. Certainly.

Senator Rockefeller. I understand you also did an extensive examination of antitrust and patent legal issues, talking with individuals at the Department of Justice and the Patent Office, reading the literature, conducting your own research. You do not undertake any comparable examination of product liability issues, do you?

Dr. Gorte. That is correct.

Senator Rockefeller. Professor Porter, as Senator Kasten has indicated, has his competitive advantage of nations book coming out. Have you read his material?

Dr. Gorte. Yes, I have.

Senator Rockefeller. Did you know that he found, in the course of the research, as Senator Kasten indicated, that U.S. product liability laws do inhibit innovation and drive up costs?

Dr. Gorte. Yes.

Senator Rockefeller. It did not make that much difference to you?

Dr. Gorte. We had to consider the views of a number of experts and the companies that we talked to. Dr. Porter's opinion is quite valid. He concludes that it is important, and so do we. I am not sure whether Dr. Porter, if he was listing the top four, would put that at the top of the list. I have never talked to him about that. And many of the others that we talked to did not put it that high on the list.

Senator Rockefeller. OK.

I guess I will just conclude with this statement that Mr. Skolnick made, Mr. Chairman, that competitiveness starts with new ideas. And you do not get into the business of new ideas unless there is a climate that is moral and humane, that protects against wrongdoing, as you indicated, Mr. Featherstone, and does so severely, as Senator Kasten's and my bill does.

You do not do that unless there is that climate. And this country seems to be building itself in the sense that we want to eliminate all risk. Because only then are we a moral society. If there is no risk to any individual, then we become a moral society.

And the consequence of that, of course, is, if we do that, and there are attempts to do that—and Mr. Kimmelman would have us not change these laws. He constantly says, well, we are just two or three apart, and he negotiates with the House last year, and then walks off from them.

You know, at some point you just do not take risks, you just do not have new ideas. And that is what we appear to be headed towards.

I thank the Chairman for his indulgence.

Senator **Bryan**. Thank you very much, Senator Rockefeller.

We thank each member of the panel for his and her contribution today. Your views will be duly noted for the record.

Our second panel this morning consists of Ms. Deborah Ballen, Vice President for Policy Development and Research, American Insurance Association; Mr. J. Robert Hunter, President of the National Insurance Consumer Organization; Mr. Peter Huber. Mr. Huber is a Senior Fellow at the Manhattan Institute. And Prof. Mark M. Hager, Assistant Professor of Law, Washington College of Law, American University here in the District of Columbia.

We will begin our testimony on the second panel, and ask those of you in the room who have conversations to conduct those outside of the hearing chamber so that we can hear each of the panelists.

Ms. Ballen, we will begin with you this morning.

STATEMENT OF DEBORAH T. BALLEN, VICE PRESIDENT FOR POLICY DEVELOPMENT AND RESEARCH, AMERICAN INSURANCE ASSOCIATION

Ms. **Ballen**. Thank you.

I am pleased to have the opportunity to testify this morning with respect to S. 1400, the Product Liability Reform Act. My testimony will focus on the relationship between tort reform, including product liability reform, and the insurance mechanism.

By way of overview, the interaction between the tort system and the insurance mechanism is twofold. First, there is a relationship between the underlying law and indemnity and expense costs paid by insurers.

Second, there is a relationship between these claim costs and the insurance market. In other words, the price and availability of insurance.

Neither of these relationships is direct, however. With respect to the first, two points are worth noting.

First, the vast majority of bodily injury claims are settled before trial, so that the law itself is not directly applied.

Second, for cases that do go to trial, case dispositions and award levels generally are influenced not only by applicable tort law doctrines, but also by the underlying facts of the case, the identity of the parties, juror perceptions and other factors.

With respect to the relationship between tort law and the insurance market, it is important to note that tort liability is only one factor, albeit a very important factor, which determines the ultimate price and availability of insurance.

Other factors, such as an insurer's book of business, its available surplus, its production and distribution costs, the return available on investments, taxes and the regulatory environment, also affect each insurers market decisions.

In considering the merits of S. 1400, this subcommittee understandably is interested in whether or not federal product liability reform will work. The answer to this question will depend on the specific provisions of any legislation which is passed, how it is interpreted by judges and juries, how plaintiffs and defendants and their lawyers respond, and a host of other factors.

In response to the interest of policymakers in measuring tort reform, however, several studies have been conducted. I would like to focus this morning on research by the Insurance Services Office. By way of background, between 1986 and 1988, nearly every state legislature enacted some form of tort reform.

However, these reform enactments in specific states varied widely in degree and significance. In 1987 and 1988, the Insurance Services Office sponsored two studies of tort reform. The first study was a survey of the opinions of over 1,200 professional claims adjusters as to the effective tort reform on six hypothetical claims.

The second study was an examination of over 13,000 actual claims. The reports are lengthy, but a few general conclusions can be drawn.

First, most of the tort reforms passed are likely to have an impact on a few types of claims. Specifically, those involving a deep-pocket defendant with limited assessed liability, and those where substantial collateral benefits are available.

This is not surprising, given that many tort reforms were targeted to these situations.

Second, the various exclusions and limitations contained in many of the statutes make their impact highly sensitive to relatively small changes in the facts.

And third, if the States had enacted more comprehensive reforms, the impact on many claims would have been much greater.

Turning to S. 1400, AIA believes that the bill is a well-intentioned effort to address important product liability reform objectives. The bill contains reforms in areas such as joint and several liability, the collateral source rule, and punitive damages.

While these substantive provisions are a step in the right direction, they are, however, modest. As a result, the bill is likely to have little or no beneficial impact on the frequency and severity of product liability claims.

However, as Senator Rockefeller stated this morning, the issue of whether or not we should have federal product liability reform should not necessarily depend on its impact on insurance.

Some of AIA's concerns about the bill are as follows:

First, the bill is silent on a number of product liability issues that appear to be among the most significant, including the state-of-the-art defense, the product misuse defense, the product alteration defense, and the open or obvious danger defense.

Second, many issues that are addressed in the bill are handled in a manner that minimizes the opportunity for any significant reduction in liability exposures. Examples of such issues include the treatment of product sellers, and the workers' compensation offset.

And third, in many instances, provisions in S. 1400 could preempt more favorable provisions of existing state law. Included in this category are the bill's statute of repose, joint and several liability reform, workers' compensation offset, and to a lesser extent, the punitive damages provisions.

To repeat, however, S. 1400 is a well-intentioned bill. However, from the perspective of insurers, it does not adequately address a number of key product liability issues. As such, it is not likely to reduce insurance claim costs or improve the insurance market.

Perhaps its greatest value is to focus attention on important public policy issues relating to our Nation's tort liability system.

Thank you for the opportunity to testify this morning, and we look forward to working with you on this and other issues.

[The statement follows:]

TESTIMONY
OF
DEBRA T. BALLEN
AMERICAN INSURANCE ASSOCIATION

My name is Debra Ballen, and I am the Vice President for Policy Development and Research at the American Insurance Association ("AIA"). AIA is a trade association comprised of 226 property/casualty insurance companies which write a large share of the commercial liability insurance sold in this country.

I am pleased to have the opportunity to testify this morning with respect to S. 1400, the Product Liability Reform Act. My testimony will focus on the relationship between tort reform (including product liability reform) and the insurance mechanism.

Overview

The interaction between the tort system and the insurance mechanism is two-fold. First, there is a relationship between the underlying law and indemnity and expense costs paid by insurers. Second, there is a relationship between these claim costs and the insurance market--in other words, the price and availability of insurance.

Neither of these relationships is direct, however. With respect to the first of these relationships, two points are worth noting. First, the vast majority of bodily injury claims are settled before trial, so that the law itself is not directly applied. AIA believes that the applicable tort law exerts a "shadow" effect on settlement values, but it is difficult to measure. Second, for cases that do go to trial, case dispositions and award levels generally are influenced not only by applicable tort law doctrines but also by the underlying facts of a case, the identity of the parties, juror perceptions, and other factors.

With respect to the relationship between tort law and the insurance market, it is important to note that tort liability is only one factor--albeit a very important factor--which determines the ultimate price and availability of insurance. Other factors--such as an insurer's book of business, its available surplus, its production and distribution costs, the return available on investments, taxes, and the regulatory environment--also affect each insurer's market decisions.

The Measurement Challenge

In considering the merits of S. 1400, this Subcommittee understandably is interested in whether or not federal product liability reform will "work." The answer to this question will depend on the specific provisions of any legislation which is passed; how it is interpreted by judges and juries; how plaintiffs and defendants (and their lawyers) respond; and a host of other factors.

Unfortunately, it is extremely difficult to measure the impact of tort reforms which have been enacted or are being considered. Some of the reasons for this difficulty include the need for experience under new laws; the possibility that some tort reforms may be declared unconstitutional; the continuing evolution of other elements of the tort law (i.e, those that were not the subject of reform); and factors external to the tort system (such as rising medical or legal costs) which affect claims payouts. Likewise, it is also difficult (perhaps even more difficult) to measure the impact of tort reforms on the insurance market itself.

Recent Research Efforts

Notwithstanding the difficulty of measuring tort reform, there have been several recent efforts to do so. I would like to take this opportunity to briefly describe several relevant studies and discuss their potential significance.

Studies of General Tort Reform

Between 1986 and 1988, nearly every state legislature enacted tort reforms. The most common tort reforms enacted were abolition or modification of the doctrine of joint and several liability (29 states); modification of the collateral source rule (16 states); caps on non-economic damages (10 states); and limitations on punitive damages (25 states). Within these categories, reform enactments in specific states varied widely in degree and significance, a factor rendering an assessment of the impact of "generic" tort reform virtually impossible. Since the various tort reforms were enacted, some have been tested and upheld as constitutional, while others have been declared unconstitutional or been subject to modification.

In 1987 and 1988, the Insurance Services Office ("ISO") sponsored two studies of tort reform. The first study, called the "Claim Evaluation Project" (completed in April of 1987) was a survey of the opinions of over 1,200 professional claims adjusters as to the effect of tort reform on indemnity payments resulting from six hypothetical claims. The respondents were asked to consider:

- The types of claims where specific tort law changes were likely to make a difference in the amount of indemnity paid, and the types where there was not likely to be an effect;
- The type and amount of change that was likely to occur; and
- The relative effects of specific tort reforms on the claims under review.

The report spans twenty-five volumes, but a few general conclusions can be drawn:

(1) Most of the generic tort changes passed in 1986 are likely to have an impact on a few types of claims--specifically, those involving a "deep pocket" defendant with limited assessed liability, and those where substantial collateral benefits are available. This is not surprising, given that many tort reforms were targeted to these situations;

(2) The various exclusions and limitations contained in many of the statutes make their impact highly sensitive to relatively small changes in the facts; and

(3) If the states had enacted more comprehensive reforms, the impact on the indemnity value of all of the claims studied

would have been much greater.

ISO's second study, called the "Claim File Data Analysis," (completed in December of 1988) was an examination of 13,136 actual commercial bodily injury claims. As part of the analysis, the respondents who reviewed the claims files were asked to consider the effect of the specific tort reforms passed in their state on the direction and size of the losses associated with the claim in question.

The findings of the closed claim analysis confirm many of the conclusions of ISO's earlier study of hypothetical claims. Specifically:

(1) Many tort reform enactments are likely to affect a greater percentage of large claims than small claims. This was the case for modifications to the doctrine of joint and several liability, changes in the collateral source rule, and caps on non-economic damages; and

(2) States which enacted broad tort reforms are likely to see more of an effect than states which more limited changes. For example, in two states--Colorado and Wyoming--that enacted statutes abolishing joint and several liability, respondents believed that more than 15% of large claims would be affected. This compares to less than 5% of large claims in states that enacted very limited reforms.

Taken together, the two ISO studies suggest that meaningful tort reform may reduce the number and dollar value of insurance losses. The size of this reduction will vary depending on the package of reforms enacted in a particular state and on each individual insurer's book of business.

Studies of Medical Malpractice

During the mid-1970's, nearly every state legislature enacted tort reforms intended to address the medical malpractice crisis. The type and significance of the changes varied considerably by state but can be grouped into those that affect: (1) standards for filing claims (including statutes of limitations); (2) standards for determining amounts recoverable (including the collateral source rule); (3) standards relating to medical care or burden of proof; and (4) dispute resolution systems. Medical malpractice was also the focus of some of the tort reforms enacted in the mid-1980's.

In an effort to measure the impact of the medical malpractice reforms of the 1970's, Patricia Danzon conducted the first significant study to relate tort liability to insurance claims.[*] Danzon's findings strongly support the argument that certain tort reforms can have a significant impact on the frequency and severity of claims.

With respect to frequency, Danzon found that enacting shorter statutes of limitations, allowing collateral source offsets, and permitting binding arbitration were statistically significant factors in explaining claim variation among states. Danzon estimated that the average effect of a one-year reduction in the statute of limitations would be an 8% reduction in total claim frequency, and that of mandatory collateral source offsets would be 14%. Danzon found that laws permitting binding arbitration, on the other hand, increased the frequency of claims.

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[*] P. Danzon, The Frequency and Severity of Medical Malpractice Claims (The Rand Corp., Report No. R-2870-ICJ/HCFA, 1982); P. Danzon, New Evidence on the Frequency and Severity of Medical Malpractice Claims (The Rand Corporation, Report No. R-3410-ICJ, 1986).

With respect to severity, Danzon found that caps on awards, voluntary arbitration, and collateral source offsets were all statistically significant in explaining variation among states. Caps on awards reduced average severity by 23%; arbitration was associated with an average 20% reduction in severity; and mandatory collateral source offsets, with reductions in awards of 11-18%.

In 1987, the General Accounting Office examined the tort reform/insurance connection as part of its five-part study of the medical malpractice crisis. The title of the GAO report, Medical Malpractice: Six State Case Studies Show Claims and Insurance Cost Still Rise Despite Reforms (GAO/HRD-87-21), is misleading, since the data contained in the report lead to the conclusion that, although insurance costs had risen over a six year period, well-designed medical malpractice reforms have had a positive effect on the price of insurance. As seen in the following chart, California and Indiana, two states widely regarded as having passed the strongest medical malpractice reforms during the 1970's experienced much smaller premium increases than did New York and Florida, which passed significantly weaker reforms:

Percent Change in Malpractice Premium Rates
between 1980 and 1986

	IN	CA	FL	NY
general surgery	56%	88%	256%	175%
anesthesiology	56%	35%	217%	96%
OB/GYN	116%	140%	395%	345%
orthopedic surgery	83%	88%	198%	216%
neuro surgery	95%	113%	370%	273%

Since the GAO did not control for other variables in the target states' demography, cost of living index, liability standards, and other factors which impact the insurance mechanism, their results are not definitive. What is significant, however, is that GAO evidently considered the effects of the 1970's medical malpractice reforms sufficient to warrant further consideration by the states of additional medical malpractice reforms for the future. In GAO's final medical malpractice report, "Medical Malpractice: A Framework For Action" (GAO HRD/87-73), GAO recommends the Secretary of HHS and the Attorney General to take the lead in developing model state laws including shortened statutes of limitations, revised joint and several liability laws, mandatory collateral source offsets, and reasonable caps on non-economic losses.

Real World Experience

Despite the severe limitations on linking tort reforms to the liability insurance market, there are signs that the availability/affordability crisis of the mid-1980's has eased greatly in both the general liability and medical malpractice lines of insurance.

The most recent insurance availability survey conducted by the Risk and Insurance Management Society (RIMS) confirms an overall trend toward improved market conditions that began in 1986 and continued into 1987 and 1988. (1989 data are not yet available.) For general liability insurance, 70% of the respondents to the RIMS survey reported coverage "easy to purchase," and 62% reported premium reductions. For product liability insurance, 60% reported premium reductions.

For medical malpractice insurance, the market also appears to be improving. In 1988, for the first time in eleven years, the aggregate cost of medical malpractice claims decreased (from $4.2 billion to $4.1 billion). Published news reports indicate that medical malpractice insurers quickly responded in the form of reduced premium rates. For example, at one point in 1989, the nation's largest medical malpractice insurer reduced rates in 32 states.

It should be stressed that not all of the last few years' improvement in the price and availability of liability insurance is directly attributable to the tort reforms of the mid-1980's. As I mentioned earlier, other factors--including the external economic environment--affect each insurer's market decisions.

Nevertheless, to the extent tort reform enactments have helped control claim costs, they have been beneficial.

Provisions of S. 1400

S. 1400 is a well-intentioned effort to address important product liability reform objectives, as they relate not only to insurance but also to international competitiveness. The bill contains reforms in areas such as joint and several liability, the collateral source rule, and punitive damages. While these substantive provisions are a step in the right direction, they are modest. As a result, the bill is likely to have little or no beneficial impact on the frequency and severity of product liability claims. The Subcommittee has heard other testimony this morning on the bill's potential impact on international competitiveness.

The bill's greatest value may be in helping to focus attention on important public policy issues relating to our nation's tort liability system. In addition, the bill offers the potential benefit of uniformity among states, with the opportunity for more consistent judicial interpretation.

Some AIA's concerns about S. 1400 are as follows:

o The bill is silent on a number of product liability issues that appear to be among the most significant. Included in the list of omitted issues are the state-of-the-art defense; the product misuse defense (except in limited circumstances where drugs or alcohol are involved), the product alteration defense, and the open or obvious danger defense.

- Many issues that are addressed in the bill are handled in a manner that minimizes the opportunity for any significant reduction in liability exposures. Examples of such issues include the treatment of product sellers and the workers' compensation offset.
- In many instances, provisions of S. 1400 would preempt more favorable provisions of existing state law. Included in this category are the bill's statute of repose, joint and several liability reform, workers' compensation offset, and, to a lesser extent, the punitive damages, provisions.

Conclusion

As I have indicated, it is extremely difficult to measure the impact of the tort system--and tort reforms--on insurance claim costs and insurance markets. Nonetheless, the insurance industry's experience from the medical malpractice crisis of the 1970's and the liability insurance crisis of the 1980's gives us some guidance in answering the question "will a particular tort reform 'work?'" That experience suggests that, while meaningful tort reform may reduce the frequency and dollar value of insurance losses, the size of this reduction will vary considerably, depending on the specific reforms passed and the type of claims in an insurer's portfolio. That experience has also taught us that ineffective tort reforms will have little or no positive impact.

S. 1400 is a well-intentioned bill. However, from the perspective of insurers, it does not adequately address a number of key product liability issues. As such, it is not likely to reduce insurance claim costs or improve the insurance market. Perhaps its greatest value is to focus attention on important public policy issues relating to our nation's tort liability system.

Thank you for the opportunity to testify this morning about S. 1400. AIA looks forward to working with the Subcommittee on this and other issues.

Senator **Bryan**. Thank you very much, Ms. Ballen.

Senator **Kasten**. Excuse me just a moment, Mr. Chairman. I was trying to change a scheduled appointment. I cannot do it.

Mr. Chairman, if we could, we spoke a moment ago about scheduling, I am hopeful and I know you are, too, that we can move through this process. My understanding is that there is one more hearing scheduled, and that is likely to the be last hearing?

Senator **Bryan**. That is the last hearing.

Senator **Kasten**. That hearing is on what day?

Senator **Bryan**. It is on May 10. It has already been cleared by the majority and minority staffs, and will be the final hearing.

Senator **Kasten**. And, Mr. Chairman, does that mean, then, that after that final hearing, we could, within a matter of days, and certainly not more than weeks, move forward to a mark up of the bill with the goal being that we would mark the bill up before the Memorial Day recess or the end of May?

Senator **Bryan**. Senator Kasten, you have been around here a lot longer than I have. As you know, the markup is done in the full committee, so I cannot speak for the Chairman of the committee, but certainly I have no objection to any time frame that can be worked out with the Chairman, in terms of when he desires to have the next markup.

But we will conclude and our record will be finalized shortly after May 10. We will leave it open for a little while, as we have today, for some questions. But that will be the last hearing, and there will be no further testimony taken beyond that, other than response to any questions that any members might have.

Senator **Kasten**. I thank you.

Senator **Bryan**. You bet.

We will next hear from Mr. Peter Huber.

STATEMENT OF PETER HUBER, SENIOR FELLOW, THE MANHATTAN INSTITUTE

Mr. **Huber**. Senator Bryan, I am very glad that you are still here, because I would like to address myself as specifically as I can, if I get a chance, to some of your concerns.

Senator, just a moment ago, you brought to the attention of this audience a case on Copper 7. Now I could talk to you this morning about any number of industries, small planes or machine tools or vaccines, but since you brought up contraceptives, I would like to talk to you about that industry in specific, because I think it is a microcosm of some of the problems we have elsewhere.

And, as it happens, this is an industry and a litigation scene that I know something about. The Copper 7, as you may know, was introduced—this is Searle's device, this is the case you cited. And incidentally, nullipara, which we will get to in a moment, means women who have had no children.

Copper 7 was introduced in the aftermath of the Dalkon Shield back in the early 1970's, around 1974. You may recall, it was evident already by then that the Dalkon Shield was a bad product, there were also mounting concerns at that time that oral contraceptives might be involved or implicated in breast cancer.

And so it was widely prescribed and, among many medical groups, thought to be a good product.

Today the solid consensus, and if you doubt this, I urge you to look into it, among Planned Parenthood, the American College of Obstetricians and Gynecologists, the CDC, NIH, and any other mainstream group that you care to consult, the solid consensus is that the Copper 7 is a superior contraceptive option, not merely safe, but a superior one for older women, especially if they are overweight or who smoke.

It is generally not recommended for young women who are sexually active because for those women there are other options, maybe somewhat better.

At the time, of course, the decisions were made, and there was less clarity about this, but overwhelmingly, I repeat overwhelmingly, by 8 or 10 to 1, the courts have agreed with this conclusion. OK? If you check the record, you will find time and time again, a major consolidation, one court after the next has vindicated this. But here and there you do get a wild card. You have enough courts around the country and enough different juries, and sooner or later you will get a wild card.

In fact, there was one large wild card verdict on the Copper 7 some years ago. The Copper 7 is a Searle product. Searle is a subsidiary of Monsanto. On the strength of that one verdict, a very large punitive verdict, in a single day's trading on the New York Stock Exchange, Monsanto lost 10 percent of its value, some $750 million on the strength of one verdict from one jury in one jurisdiction.

That is precisely the kind of problem we are talking about here.

This has not, of course, been particular to one product or to one company. The effects have spilled over to the entire contraceptive industry. I would refer you to a major article by Carl Gerasi, who was the developer of oral contraceptives in the 1950's, and essentially created the modern contraceptive industry in this country. The article was published in "Science Magazine" last year.

Gerasi documents the essential collapse of the U.S. contraceptive industry.

Mr. Kimmelman may not be aware of other products that are available elsewhere but are not available here. I would refer him to Mr. Gerasi's article. In the contraceptive industry alone we can identify half a dozen of those products. An industry we invented, I might add, that our scientists created 30 years ago.

This has become the principal product of the U.S. contraceptive industry in recent decades. This, in normal type, would run about 20 pages. This is the package insert that goes with oral contraceptives today. Some substantial parts of this are lifted verbatim from various idiosyncratic legal decisions that have been passed around the country on failure to warn.

And quite a number of the warnings in here, before they were put in here under the pressure of the courts, were rejected by the FDA as scientifically unfounded and as unnecessary.

The collapse of the IUD market in this country, and I am not going to defend the Dalkon Shield, I am glad that is gone, but the collapse of the superior options, according to estimates by Dr. Elizabeth Connell, who is a doctor, I believe at Duke, although I would have to check that, the loss of the IUDs have led to 160,000 unintended pregnancies in this country, as 2 million former IUD users have hunted around for other options, and some of them have been left wanting.

Of those 160,000 unintended pregnancies, 72,000 are estimated to have ended in live births, and 88,000 abortions as a result. The current caesarean section rate in this country is running something like 20 percent or approximately double everywhere else it is in the world. And by all accounts, that high rate is in large measure due to the malpractice fear of doctors.

So we are talking probably some 14,000 unnecessary caesarean sections, or 7,000 to 14,000 caesarean sections as a result of these products. The expense of that is about three or four times conventional delivery, and the mortality rate is two to four times higher than in standard, conventional deliveries.

It has been asked how are conditions different in Europe? I have no authority to do so, but I think I can tell you with absolute confidence that every backer of S. 1400 would, in one minute, would take the European system, lock, stock and barrel, including the recent EC directive.

Let me tell you about some of the principal features in Europe. No civil juries. England abolished them 40 or 50 years ago everywhere except in libel cases. No punitive concept whatsoever. No punitive damages at all. Not limits on them here and there, it just is not there whatsoever. No contingency fees. Experts largely appointed by the courts.

Essentially, this European directive, the new EC directive has not been worked out in detail yet, but, by all accounts, they are talking about strict liability for manufacturing defects. There is absolutely no sign, none whatsoever, that they are going to have open-ended litigation, whereby juries are asked at random whether airplane engines should have a carburetor or a fuel injector as their fueling system.

And if the history in Europe is any pattern, these questions will simply not—they certainly will not be put to juries, and the courts will not litigate design questions of that kind at all.

Now, as I said as the outset here, I could have talked about a number of other areas here. I will mention some of the consequences of this. Mr. Kimmelman suggested that 6,000 lives may be saved a year from our liability system. I will quote to you a March 1986 estimate of Dr. Vincent T. DaVita, who was then head of the National Cancer Institute, who estimated that some 10,000 cancer patients a year were dying because of undertreatment, because of doctors' unwillingness to prescribe aggressive chemotherapy, truly aggressive chemotherapy.

And Dr. DaVita attributes some component of that unwillingness to fears of product liability.

One could go on down this list, and I am just astounded that Mr. Kimmelman says he knows of no products that have been driven from the market. I mean there is Bendectin, we have lost. There are several vaccines that are simply not sold in this country that protect against Asiatic and Third World diseases.

One could go on through aviation and chemicals and medical devices and machine tools. We have a major problem. I do not think you have a big enough bill to fix it, but it is a start.

[The statement follows:]

STATEMENT OF PETER HUBER
Before the Consumer Subcommittee
Committee on Commerce, Science and Transportation
United States Senate
April 5, 1990

Good Morning. My name is Peter Huber, and I am a Senior Fellow of the Manhattan Institute for Policy Research. I would like to comment on the ways in which U.S. product liability laws inhibit American innovation and handicap U.S. product manufacturers competing in the global market.

I have some experience on both sides of this issue. I was trained as an engineer, and taught engineering at M.I.T. for six years after completing my doctorate in mechanical engineering there. Indeed, I first became interested in the unintended consequences of U.S. liability law while working as an engineer, and that perspective still animates my interest in this problem. But I have also had a chance to observe the workings of the legal system from the inside, most vividly during my clerkship to Supreme Court Associate Justice Sandra Day O'Connor. I have published a book[1] and many articles that address the impact of liability on innovation.[2] I am now writing a

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[1] P. Huber, Liability: The Legal Revolution and Its Consequences (1988).

[2] See, e.g., The Bhopalization of American Tort Law, in **The Positive-Sum Strategy: Harnessing Technology for Economic Growth** 191-212 (R. Landau & N. Rosenberg, eds., Nat. Acad. Sci. 1985). Reprinted in **Hazards: Technology and Fairness** 89-110 (Nat. Acad. Eng. 1985); Legal Handbook for Architects, Engineers and Contractors, Vol. 2, Risk and Risk Management (A. Dib, ed., Clark Boardman Co., N.Y., 1986); Environmental Hazards and Liability Law, in **Liability: Perspectives and Policy** (R. Litan & C. Winston, eds.; Brookings, 1988); Proceedings of the Academy of Political Science, Knowledge of the Law is No Excuse, in **New Directions in Liability Law**, Vol. 37, No. 1, (W. Olson, ed. N.Y. 1988); Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 **Col. L. Rev.** 277 (Mar. 1985); A Closer Look at Injury Litigation Trends, 238 **Science** 31 (October, 1987); A Comment on Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence

(continued...)

second book on the misuse of scientific and technical evidence in U.S. courts. And in collaboration with Robert Litan at the Brookings Institution, I am currently organizing a symposium, to be held in June of this year, on the subject of liability, safety, and innovation.

Moving Backward

The theory that many lawyers and many state courts came to accept in the 1960s, 1970s, and much of the 1980s, was that if we sue more people more often we will enhance safety and spur innovation and technological progress. Concern about potential liability, the argument runs, will encourage the best and the brightest of our scientists and engineers, physicians and pharmacologists to develop new products, processes, and procedures that will make life safer and generally improve the public welfare.

Today, some twenty years after this theory first gained prominence, it is becoming quite apparent that the theory is wrong. Or at the very least, the theory is not working as promised under the liability rules that U.S. courts have fashioned to implement it. As liability has advanced, our most innovative capital and talent have

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[2] (...continued)
By E. Donald Elliott, 69 **B.U. L. Rev.** 513 (1989); No-Fault Punishment, 40 **Alabama L. Rev.** 1037 (Spring 1989); Flypaper Contracts and the Genesis of Modern Tort, 10 **Cardozo L. Rev.** 2263 (Aug. 1989); Who Owns the Cherry Pit? **Harvard J. Law and Public Policy**, forthcoming Spring 1990; Junk Science and the Jury, **University of Chicago Legal Forum** (forthcoming, Spring 1990); On the Law and Science of Things That Aren't So, **Valparaiso Law Review** (forthcoming, Spring 1990); Junk Science in Court, **Daedalus**, forthcoming Fall 1990.

retreated. Entire sectors of industry, of enterprise, and of innovation have actually shut down. And no business has proved more unsafe -- in legal terms -- than the business of enhancing consumer safety.

Let's start with a look at the record in just a few of the industries that have been targeted most aggressively and successfully by liability lawyers in the past 10 or 20 years.

No one should expect that Merrell-Dow pharmaceuticals will soon be developing a new anti-nausea drug for pregnant women; I can report with some assurance that it will not be.[3] And this notwithstanding the fact the company won time and time again when the perils of Bendectin came to be litigated in court. It won the verdicts, but still incurred colossal losses in legal fees, in the endless vexation of interminable litigation, and in reams of adverse publicity that no large company can possibly afford. As the bitter joke among company lawyers has it, is you're pregnant and suffering from debilitating morning sickness, go see your lawyer. Your doctor has nothing left to prescribe.

In the early 1960s, the United States led the world in contraceptive research and marketing. Today, the smart money is out of the business.[4] U.S. research and development expenditures in this area peaked in 1972, and have plummeted 90 percent since. Steroidal oral contraceptives in this country underwent their last significant change in 1976, and the last truly new contraceptive entity was introduced in 1968. Europe already has access to at least two later-generation oral contraceptives, and a variety of other options completely unavailable in the U.S. There is no shortage of demand for a better, safer contraceptive. But thanks to proliferating lawsuits and skyrocketing liability costs, no real profit beckons anybody who is in the contraceptive or reproductive health industry today.

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[3] Oreffice, The Year Tort Reform Must Happen, Imprimis, Vol. 16, No. 7 (July 1987); Project on Civil Justice Reform, Manhatten Institute for Policy Research, Comparative Risk, at 1-2 (June 13, 1987).

[4] See, e.g., Carl Djerassi, The Bitter Pill, 245 Science 356 (July 28, 1989).

The virtual demise of the U.S. vaccine industry tells a similar story. The United States used to have at least eight large centers of private capital and R&D in vaccines. Today we are down to two. The public health consequences of this cannot be quantified, but they are surely incalculably large. Scientists associated with the government, educational institutions, or private foundations, are working furiously to develop an AIDS vaccine. But what large company will have the resources, the manufacturing capabilities -- and most important of all, the insurance and the will -- to mass market such a product if it is ever developed. I expect that this Committee, some years hence, will probably find itself debating legislation identical to the Swine Flu bill of 1976, whereby the federal government assumes liability for such a product because no one else is willing to.

The pharmaceutical industry's problems are relatively well known. The liability system's adverse impact on innovation, however, extends far beyond pharmaceuticals, to a number of industries where the United States once held a technological lead.

I happen to be a private pilot, so I'm familiar with the light aircraft industry. I'm well aware that the Senate is considering a separate bill for the aviation industry -- a bill that I commend to your attention -- but the problems of this industry, though you address them in separate legislation -- are symptomatic of problems in many other high-tech engineering sectors of the economy. As rising liability costs imposed a 50 percent surcharge on new-model light aircraft, companies like Piper, Beech and Cessna virtually abandoned the low end of the market.[5] Some have recently crept back at the margins -- though without liability insurance, relying on scorched earth litigation tactics to try to keep the trial bar at bay. It is far from clear, as of this writing, whether those tactics will succeed.

The disappearance of new small planes has done nothing to improve the safety of light aircraft. Quite the opposite! People -- like me -- still fly in small planes, because there are plenty of them around. They just happen to be 10 or 20 years old. Small planes last forever because pilots, for fairly obvious reasons, are quite scrupulous about checking the oil and such. So the planes survive, but the technology is decades out of date. Some will brush this aside, as a problem for only a few eccentrics who insist on flying their own planes. But if you look at the history of aviation technology in this country, innovation -- the development and testing of new engines, new airfoils, canards, and control surfaces, new fuselage materials -- has generally come from the small, private sector and then trickled upward. The United States has long enjoyed a technological and competitive advantage in aviation. Now we have cut this industry off at its roots.

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[5] See U.S. Dept. of Commerce, International Trade Administration, A Competitive Assessment of the U.S. General Aviation Aircraft Industry, (1986).

Similar problems beset other manufacturers of complex engineering systems. Companies that make escalators and elevators, machine tools, industrial robots, and other types of heavy industrial machinery all face similar liability pressures. And when those companies retreat or abandon certain lines of business altogether, the effects on safety can be equally regressive. The products are long lived, and if new technologies are not developed and deployed, the old ones will be nursed along years after they should have been replaced. This is as bad for consumers as it is for the companies that could have provided the replacements.

Other examples are not difficult to find. Asbestos is usually pointed to as one of the great success stories of the modern liability system. After all, some forms of asbestos, used in some conditions, can be very dangerous, as many grievously injured people can attest. But very few people know the latest chapter in the asbestos story. Asbestos is still widely used in this country for such things as brake linings and brake gaskets, for the very simple reason that you need a product with its unique thermal and other physical properties for these applications. There is no good substitute available.

Correction: There probably is a good substitute, but the company that developed it dares not bring it to market. The substitute is calcium sodium metaphosphate, developed by Monsanto a few years ago. By all appearances, the product is safer than asbestos, and could be an ideal substitute in many applications. It is biodegradable, so if the fibers do lodge in the lungs, they break up and are metabolized. But Monsanto has pulled the plug on the product, and for good reason. Any lawyer in the country who has studied the liability scene would have had to advise the same. You would have to verge on the lunatic to think of marketing any product that would be distributed through the same channels as asbestos, that might come to be mixed up with asbestos-containing substitutes, and that thus might all-to-easily be swept up in the conflagration of asbestos litigation. Even as we speak, asbestos lawyers in this country are coming into billions of dollars of new capital from successful asbestos lawsuits. They are looking for new places to invest their money. The obvious new targets will be asbestos substitutes on the scene, which even if much safer than asbestos are unlikely to be completely risk free.

Yet another major chemical company -- I have talked with the executives in question, but they prefer to remain unnamed -- recently developed a composite concrete material to be used in bridges. The product marks, by the company's best internal estimates, a significant improvement in both price and performance over existing materials. The company halted development of the product a couple of years ago, however, after watching another chemical company become mired in litigation over a concrete additive widely used in buildings in the 1960s. The decision was based purely on liability considerations. If you sell this new bridge product across the country, and get thousands of municipalities and contractors to use it, and then one bridge goes down, the ensuing litigation could mean the end of your company. It is far safer, from the legal perspective, to stick with what is already ubiquitous and familiar, so well entrenched and commonplace that it ranks with butter, as familiar, standard, and therefore impossible to sue.

One must recognize that these are not just a few isolated examples that can be addressed by a few industry-specific fixes.[6] Other products that could have been on the market today but for the unpredictable specter of open-ended liability include a non-chemical pesticide replacement,[7] a portable kidney dialysis machine,[8] and a chemical process that speeds up decomposition of hazardous wastes, to mention just a few.[9] Table 1 lists others. One of the most disturbing features about this is that so many of these products have marked in the past -- or promise, for the future -- important *advances* in quality or safety.[10] It is ironic that among products abandoned by sporting goods companies, many of them were protective or safety equipment.[11] Rather than assuming unrealistic and speculative responsibilities as guarantors of absolute safety, many of these manufacturers decided to abandon the markets altogether.[12]

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[6] *See also* Mahoney and Littlejohn, "Innovation on Trial: Punitive Damages Versus New Products," 246 Science 1395 (Dec. 15, 1989).

[7] Product Liability Coordinating Committee, *U.S. Product Liability Laws: A Crisis in International Competitiveness*, at 3.

[8] Mahoney, *Innovation on Trial: Product Liability v. Global Strategy* at 8 (1988).

[9] *Testimony on Product Liability Reform, Hearings Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess., May 5, 1987 (Testimony of Robert H. Malott, Chairman and Chief Executive Officer, FMC Corporation, at 9).

[10] *See* Permut, *Biotechnology Law: Public Protection or Stifled Progress*? 5 Delaware Lawyer 26-27 (Summer 1986).

[11] *Hearings on Product Liability, Before the Consumer Subcomm. of the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 2nd Sess. (May 20, 1986) (statement of Larry McClain, for the Sporting Goods Manufacturers Association).

[12] *Id*.

The conclusion is now beyond dispute: Businesses react to the actual or perceived threat of liability by withdrawing products, halting research, and altogether avoiding new product lines. Plant closings or business failures have been attributed directly to U.S. product liability laws for the manufacturers of textile machinery,[13] medical devices,[14] and gymnastic equipment.[15] The chilling effects of liability extend far beyond companies that are actually sued; through the insurance system, these effects propagate across entire industries and categories of enterprise.[16] Several studies have referred to the disparate impact of product liability laws on small businesses,[17] which have far less capacity to absorb extraordinary increases in liability insurance premiums or open-ended legal expenses from defending against groundless litigation.[18]

Even academic institutions have been adversely affected. Many universities, often the source of new product development and technological advances, license new products to small businesses that need the advantages a particularly innovative product might bring. [19] But, due to concerns that large, well-financed universities might be targets for product liability suits involving these new products, universities are reluctant to continue this licensing scheme.[20]

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[13] Statement of the Honorable Carroll A. Campbell, Jr., Cong. Rec. E2897, June 14, 1983.

[14] McGuire, The Conference Board, Report No. 908, The Impact of Product Liability, at 18 (1988).

[15] Transcript, "20/20," ABC-TV, aired Oct. 20, 1989, at 7; Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2nd Sess., at 7 (1986) (Statement of Larry McClain, for the Sporting Goods Manufacturers Association).

[16] See, e.g., Conference Board Report, supra note 14, at 18; Transcript, "20/20," ABC-TV, aired Oct. 20, 1989, at 7.

[17] See, Conference Board Report, supra note 14, at 29-35; Reuter, The Institute for Civil Justice, RAND Corp., The Economic Consequences of Expanded Corporate Liability: An Exploratory Study, at 43 (1988).

[18] Id. at 43-44.

Changing rules

What exactly has gone wrong? Why have the consequences of expanded liability in U.S. courts been so very different from what many jurists and legal academics expected when liability rules were rewritten from the 1960s to the 1980s? Various legal changes, though often well intentioned, had consequences that were simply not anticipated or properly thought out. As has happened elsewhere, grand social experiments sometimes end up backfiring to the utter amazement and consternation of party theoreticians.

To begin with, the new rules of strict liability invented by U.S. courts in the 1960s and 1970s instruct juries to assess the actual design of a new product -- not the conduct of those who create and market the product. The good faith, reasonable care, and conscientious training of the designers or the assembly-line workers is irrelevant.

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[19] Hearings on Product Liability Law Reform, Before the Consumer Subcomm. of the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 2nd Sess. (1986) (May 20, 1986) (Testimony of Mr. John Preston, Director of Technology Licensing, Massachusetts Institute of Technology, and Mr. Niels Reimers, Director of Technology Licensing, Stanford University).

[20] Id.; see also Conference Board Report, supra note 14, at 19.

Technology itself stands in the dock. The U.S. stands alone in the world in imposing such standards of liability.[21]

This seemingly modest change in legal doctrine has tilted the entire liability system against innovation. Jurors can make reasonably sensible, intuitive judgments about other individuals, even professionals. But they are not experts in engineering, pharmacology, or aerodynamics.

Consider how a typical liability lawsuit proceeds in a U.S. court today. After an accident, jurors are given a few days, occasionally a few weeks, to evaluate the design of a mass-vaccination program, a power plant, a military aircraft, an escalator, or a lathe. Sympathy for the victim, while quite understandable, does not improve the technical analysis. If the only way to help out some unfortunate claimant is to find a design defect, then that is what many juries will find. Moreover, human nature is predisposed to accepting the old and familiar risk, while rejecting the novel and exotic. Cigarette makers win, whereas pioneers of vaccines or medical devices are in constant peril. One result -- and here I speak from my own experience -- is that consulting engineers are pressed to favor older design options in their specifications, fearing that new ones will carry greater risk. Not physical risk -- newer is, more often than not, safer than older -- but rather legal risk.

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[21] The E.C. countries are very tentatively moving toward some form of strict liability for manufacturing defects. See Thieffry, PLI No. 371, EEC Directive 85/374 on Liability for Defective Products: Implementation and Practice, at 31-47 (1989). As of this writing, however, no other country comes close to enforcing the sweeping doctrine of strict liability for "design defects" applied in U.S. courts. See Nutter, Tipping the Scales Against Us, Best's Review 34 (Sept. 1988).

At the same time, U.S. courts have become exceedingly particular about safety warnings. Up to a point, one would want nothing less -- but only up to a point. As the law in various states stands today, it will not suffice to warn of a risk of death; the seller must warn specifically of the risk of stroke or serum sickness or acute encephalopathy. It will not suffice to warn the prescribing doctor of a drug's hazards; the drug company must somehow also get the information to the patient too. Grossly obvious risks must be flagged, but so must some risks that arise only from the most bizarre forms of consumer abuse. The only way to learn how to meet such demands is through long perseverance in the market and the courts. The warnings provided with oral contraceptives have been honed for thirty years, to the point where they occupy pages of densely detailed text, with substantial parts developed, one at time, in the aftermath of adverse liability verdicts. No equivalent detail can be provided for a truly new IUD, because the risks are much less familiar--even if their general nature is known and even if the IUD is demonstrably safer, overall, than the pill it could replace.

The U.S. law's attitude toward safety improvements made after an accident has also changed. At one time, courts used to bar a plaintiff from offering any evidence of such conduct--the redesign or recall of a product, a post-sale or postaccident change in a process, or the addition of a new safety system. Safety improvements must be encouraged, the logic ran, and so should never be used to condemn past shortcomings. But in the 1960s, this rule too came under direct attack.[22] Evidence of subsequent remedial measures was first admitted to impeach witnesses, then to prove that the defendant controlled the premises in question, then to show that conditions had changed since the time of the accident or that changes in design were feasible. The exceptions nibbled away at the rule until some courts were so emboldened, they swept the tattered remains aside entirely.

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[22] See J. Hoffman and G. Zuckerman, Tort Reform and the Rules of Evidence: Saving the Rule Excluding Evidence of Subsequent Remedial Actions, 22 Tort & Ins. L. J. 497 (Summer 1987).

Changes in U.S. rules on when suits may be filed have had a second effect that is particularly hostile to the commercialization of new products. Suits can now be filed decades after the car gear box, herbicide, or strip-mining machine, was designed or used. Defects in technology, like negligence in human conduct, depend critically on the context of time and place. The best-designed cars of 1950 were clearly deficient by 1980 standards, as were the best medical procedures, industrial chemicals, pesticides, or home appliances. When the sun never sets on the possibility of litigation, each improvement in method, material, or design can establish a new standard against which all of your earlier undertakings, no matter of what vintage, may then be judged. Finding a way to do better today immediately invites an indictment of what you did less well yesterday, or twenty years ago. Mature firms that sell long-lived products therefore have good reason to hesitate before commercializing a significant new improvement; doing so may very well promote successful litigation against the company's older vaccine, small plane, escalator, or lathe, still in use in the market.

There has also been a sharp rise in demands for -- and awards of -- punitive damages in U.S. courts. Many factors go into such awards, and some of the awards are undoubtedly justified by egregious misconduct. But here too, abandoning familiar and established technology may -- for legal purposes -- be the riskiest course of all. Many of the breakthrough punitive awards were assessed in the early 1970s against manufacturers of small cars, when such vehicles (and their attendant risks) were still novelties on the U.S. market. By contrast, it can hardly be termed "reckless" or "outrageous misconduct" (the usual triggers for punitive damages) to do what the great mass of society has done for decades. This may help to explain why U.S. tobacco companies have yet to be assessed any punitive damages, and indeed have so far lost only one verdict for compensatory damages.

Most generally, one animating principal of modern tort law is that products should come wrapped in a special-purpose insurance contract, to help spread the costs of accidents. But when can such wrapping be found at a reasonable price? The availability of insurance depends largely on an accumulation of accident experience.[23] That is something that established technologies always have and truly innovative ones never do. Insurance is easiest to find when a good has been used by many people for many years, so that the frolics and caprices of tort liability have been as far as possible washed out and the statistics of experience speak for themselves. Innovation necessarily starts without an established market, and so is often condemned to start without insurance as well. For the prudent businessperson, a start without insurance is often worse than no start at all.

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[23] Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1527 (1987).

Orphan drugs reveal some of these problems in particularly tragic circumstances. Only a few hundred American children suffer from cystinosis, a fatal kidney disease. About 2,000 adults suffer from Charcot-Marie-Tooth disease, a rare nerve disorder (unrelated to teeth) that severely impairs motor function. About 1,000 suffer from leprosy and experience an extremely painful allergic reaction on their skin. A tiny number suffer from a rare but incapacitating disease characterized by uncontrollable twitching of the eye muscles.[24] There are some 5,000 other orphan diseases that shorten lives or bring agonizing disability to tiny groups. Therapies are available or under development for some 500 of them.[25] But insurance is often all but impossible to obtain. Chemie Grunenthal, for example, a West German company that once supplied thalidomide to American leprosy victims, announced in 1986 that it planned to abandon the U.S. market to avoid the risk of liability that might arise if, for example, the drug was used in excess or fell into the wrong hands.[26] Until recently, another West German chemical company supplied Americans with botulinum, a paralytic poison that is just right for controlling the eye-twitching disease, but the company cut off supplies in 1986 for similar reasons.[27] Orphan drugs are condemned, in a sense, to be perennial newcomers to the commercial world and are therefore forever uninsurable under the modern rules. Business realities take care of the rest.

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[24] P. Boffey, "Loss of Drug Relegates Many to Blindness Again," New York Times, 14 October 1986, p. C1.

[25] N. R. Kleinfield, "'Orphan' Drugs: Caught in Limbo," New York Times, 20 July 1986, Section F, pp. 1, 27.

[26] Id.

[27] Id.

In these and other diverse, often subtle ways, U.S. product liability laws decrease innovative product development because innovative products, by definition, create unknown liability risks.[28] Manufacturers cannot protect against these risks with insurance, because insurance often is not available for innovative products.[29] Because insurers cannot accurately determine the probability of the risks from the innovative products they are asked to insure, they refuse to provide insurance.[30] Few manufacturers have the financial reserves needed to go forward with a product that poses unknown liability risks without the safety net of liability insurance.[31]

Competitive Implications

Liability rules in the U.S. have grave implications not only for American consumers, who lose domestic products, but also for American producers, who lose international markets. While U.S. high technology is caught in the grip of tort liability, other countries around the world are free to pursue innovation and competitive advantage.

Made in America often means you can sue in America. A U.S. firm selling an American-made drug, car, chemical factory, or aircraft to India is forced today to sell expensive accident insurance along with it; a German firm competing for the same sale is not. Of course, the Indian consumer will get something extra along with the American product--the right to sue in U.S. courts if an accident should occur. But how much is it worth to him? The tort-mandated accident insurance that is even a bad deal for the American bank janitor (because it is priced to compensate the lost earnings of the bank presidents too) is a horrendous deal for the impoverished Indian farmer.

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[28] See Marley, "Delayed Decisions Often Result in Lost Opportunities," Marketing News, at 16, May 8, 1987.

[29] Priest, supra note 23.

[30] Id. at 1544-1545.

[31] Id.

The American competitive position is disadvantaged even within the U.S. market. Manufacturers remain liable for their products as long as they are in use.[32] When an established U.S. company goes shopping every year to renew its insurance policy, it is therefore likely to be paying in part for its commercial history. More recent business arrivals on our shores do not carry the excess insurance baggage of their own past. In industries as diverse as light aircraft, truck wheel rims, machine tools, sporting goods, and industrial machinery--all long-lived products--U.S. tort law has given foreign manufacturers an important competitive edge, not just in overseas markets but in the United States as well.

Simple diseconomies of scale also play their part. American companies have their commercial base in the United States, and thus shoulder U.S. liability costs on all their startup development and production. Foreign competitors can build up a large base of operations without this element of overhead--which tends to be especially large with young and innovative technology--and then move into the U.S. market at the margin, when the product is mature enough to make exact warnings possible and insurance affordable.

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[32] *See*, *e.g.*, *General Aviation Accident Liability Standards Act of 1989, Hearing on S.640, Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); Statement of the Honorable Carroll A. Campbell, J., Cong. Rec. E2897, June 14, 1983.

Finally, many foreign companies can effectively limit their total liability on U.S. operations by the cold-blooded expedient of keeping only limited assets in this country. No American concern can get away with such a strategy.

These factors almost certainly are a significant part of the reason why foreign manufacturers have completely taken over the markets for hockey equipment, trampolines and other gymnastic equipment;[33] and the markets for certain vaccines and contraceptive devices.[34]

Getting Back to Yes

With the help of our courts, we have become the world's greatest experts at saying no. A just-say-no philosophy of government is useful for some problems, in some circumstances. But for most of the more subtle choices we face in life, one must also have the legal power to say yes -- selectively, of course, but emphatically nonetheless. Without an effective legal system that lets people make binding positive choices, we all end up living in a spare world, devoid of many goods and services that would provide social benefits far in excess of their social costs.

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[33] Transcript, "20/20," ABC-TV, aired Oct. 20, 1989, at 7; Hearings on Product Liability, Before the Subcomm. on Consumers of the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2nd Sess., at 7 (1986) (Statement of Larry McClain, for the Sporting Goods Manufacturers Association).

[34] Connell, The Crisis in Contraception, 90 Technology Rev. 46 (May-June 1987).

What has eroded, under the pressure of turbulent liability, is our ability, individual (through contract) or collective (through such agencies as the FDA) to say yes. The pregnant mother debilitated by morning sickness may desperately want relief. The FDA may approve Bendectin, and continue to approve it to the present day. But scattered juries, perhaps even a single run-away jury sitting in Washington D.C., well intentioned no doubt but utterly incapable of assessing the drugs' nationwide costs and benefits, can effectively override the preferences of millions of individual consumers and the approval of a federal regulatory agency. One cannot run a national railroad, or an international pharmaceutical business when safety choices are so dispersed, so uncoordinated, and so unpredictable, that any random panel of twelve stout citizens, unguided by any national norms at all, can promulgate standards for the nation.

If the only goal of U.S. products liability laws is to change business behavior, product liability laws are surely fulfilling their objective: without doubt, they have profoundly influenced corporate behavior from the highest echelons of management to the worker on the plant floor. But what we want is not just change, but change for the better, and that is not what we have been getting. Time and again, however, the actual effect of product liability laws has been to modify corporate behavior that never was unreasonable; that, in fact, was beneficial to society.[35]

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[35] See, e.g., Huber, Liability, The Legal Revolution and Its Consequences, ch. 10 (1988); Project on Civil Justice Reform, Manhattan Institute for Policy Research, Comparative Risk, at 1-2 (June 13, 1987); Research and Policy (continued...)

For these reasons, S. 1400 merits action by this Subcommittee. It addresses a few of the most egregious abuses within the current system. I would have backed a much stronger bill, one that emphatically moves away from liability-centered procedures toward fair warning, first-party contract, and first-party insurance. But I recognize that S.1400 represents that greatest of Washington products, the compromise, and compromise though it is, it is a step in the right direction.

Let me close by acknowledging that liability reform is a tough political issue to tackle. The opponents of reform -- who are also the principal beneficiaries of legal business as usual -- have a great deal at stake. Many members of the plaintiffs' bar, so adept at styling themselves as great defenders and protectors of the common citizen, are in fact people of truly enormous wealth and influence. Many of them, indeed, are both wealthier and politically more influential than the captains of industry -- often the small business man and woman -- who they claim to be policing.

The most important victims of our current system, those numbered among workers and consumers, are much harder to identify. We can't easily point to a patient who would have been cured by a drug that was never developed, or a worker who would have been hired by an industry that was never born.

Liability reform is, and should be viewed, as a consumer issue. But it requires either ignorance or disingenuousness to maintain that whatever is good for producers is therefore bad for consumers, that an unlimited right to play litigation roulette is an

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[35] (...continued)
Committee, Committee for Economic Development, Who Should Be Liable? A Guide to Policy for Dealing with Risk, at ch. 5. (1989).

unqualified consumer benefit. Unless the government is to supply everything to everyone -- an approach to things in some disrepute these days -- consumers need producers as much as producers need consumers. Balanced liability standards, that preserve the right to sue within reasonable bounds that accommodate the demands of national production and international competition, are better not only for those who wish to sell, but also for those who need to buy.

I would not support S.1400, or any other legislation along such lines, if I were not profoundly convinced that the largest beneficiaries would be consumers themselves. As a fairly new father of a twenty-month old girl, who has just finished getting her childhood vaccines, who will in years to come be using bicycles and playground toys, appliances, medicines, escalators, cars, cosmetics, and cuisinarts, I cannot imagine backing any kind of legislation that I believed would make her world less secure. The long-term security of my daughter -- and yours -- is not being secured by our uniquely American right to sue anyone, anytime, in any forum, under standards that shift constantly without national guidance or anchor.

APPENDIX

- U.S. sporting goods manufacturers have stopped making hockey equipment, which now comes primarily from Czechoslovakia, Sweden, and Canada; and trampolines, which must also be obtained from foreign sources.[36]

- The number of football helmet manufacturers decreased from 18 in 1976 to 3 in 1986.[37]

- Only two makers of lacrosse equipment remain in the U.S. and both are experiencing difficulty obtaining liability insurance.[38] Spaulding, a major sporting goods manufacturer, has withdrawn from production of protective sporting equipment entirely.[39]

- The number of U.S..pharmaceutical companies producing contraceptives has decreased from 13 in the early 1970's to two in 1988.[40]

- G.D.Searle & Co. withdrew the Copper-7 intrauterine contraceptive device from the market although it had a long history of safe use.[41]

- Merrell-Dow Pharmaceutical Company recently removed its drug Bendectin, used to treat morning sickness in pregnant woman, from the market.[42] Used by over 33 million woman over several decades, certified as safe and effective by FDA, Bendectin cost Merrell-Dow $18 million in legal expenses, while it created only $20 million in sales.[43]

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[36] Hearings on Product Liability, Before the Consumer Subcomm. of the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 2nd Sess., at 7 (1986) (statement of Larry McClain, for the Sporting Goods Manufacturers Association); see also Stevenson, The College Sports Industry, Athletic Supplies. Stakes are High, New York Times, June 10, 1986, § B, at 9.

[37] Id.

[38] Id.

[39] Malott, Commentary: Product-Liability System Hampers Competitiveness, Financier, Jan. 1988, at 30.

[40] Connell, The Crisis in Contraception, 90 Technology Rev. 46 (May-June 1987).

[41] Mahoney, supra note 8, at 7.

- The reluctance of pharmaceutical companies to manufacture and distribute certain vaccines, out of fear of incurring inordinate product liability costs, coupled with the essential nature of many vaccines to human health, prompted the U.S. government to twice enact special legislation in which it assumed some financial responsibility for vaccine costs and liability.

- Merck & Company continues to be the only U.S. producer of a measles vaccine for American schoolchildren, continuing production solely out of a sense of social responsibility.[44]

- Lederle Laboratories, now the only remaining manufacturer of DPT vaccine,[45] increased the single dose cost of DPT vaccine from $2.80 in 1986 to $11.40 in 1987, primarily because of increased product liability costs.[46]

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[42] Project on Civil Justice Reform, Manhattan Institute for Policy Research, Comparative Risk, supra note 3.

[43] Oreffice, supra note 3, at 3. Because it could not justify keeping the drug on the market in light of those figures, Merrell-Dow removed the drug from the market, despite official protests from over 1200 physicians. Id.

[44] Product Liability Coordinating Committee, supra note 7, at 4.

[45] DPT stands for diphtheria, pertussis and tetanus.

[46] Conference Board Report, supra note 14, at 10.

- Wyeth Laboratories abandoned production of the DPT vaccine, leaving Lederle Laboratories, a U.S. competitor, as the sole U.S. manufacturer of the vaccine.[47]

- Puritan-Bennet Co., of Virginia, stopped making anesthesia gas machines to avoid the risks of potential product liability suits.[48]

- Cessna stopped making the small airplanes used by the Ohio State Highway Patrol for the better visibility they provided. Cessna stopped production because it could not longer afford the potential liability from small planes like those used by the Ohio police.[49]

- Both Beech Aircraft and Piper Aircraft suspended production of light single- and twin-engine aircraft.[50]

- Uvex Winter Optical decided to no longer manufacture and distribute motorcycle helmets and ski racing helmets because of liability costs.[51]

- American Motors stopped production of the Jeep CJ model because product liability insurance became too expensive to justify keeping the model in production.

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[47] Hearings on Product Liability Reform, Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess., May 5, 1987 (statement of the U.S. Chamber of Commerce, at 5).

[48] Schwartz, Product Liability, A Crisis Well With Us, Across the Board, Oct. 1987, at 16; Mahoney, supra note 8, at 8.

[49] Transcript, "20/20", ABC-TV, aired Oct. 20, 1989, at 2-3.

[50] Pagano, Liability Costs Cut into Airplane Sales, Los Angeles Times, June 30, 1986, Part 4, pg. 1, col. 3.

[51] Testimony on Product Liability, Hearings Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess., May 5, 1987 (testimony of John B. Curcio on behalf of the National Association of Manufacturers, at 3).

- Dyneet Corporation stopped production of its helicopter clutches, although it had not had any product liability claims filed against it, because it could no longer afford to purchase liability insurance for the clutch.[52]

- Crawford Fitting Company has decided to eliminate hot air balloon valves from its product line due to a 1,535% increase in liability insurance.

- The McJunkin Corporation of Charleston, West Virginia, has decided to sell its coal-mining equipment division because the company's product liability insurance increased by 500% in 1985.

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[52] Product Liability Coordinating Committee, supra note 7, at 6.

Senator Bryan. Please make available to the Committee and to Mr. Kimmelman those products that you allude to, at least in part, so that we might have that for our record, please.

We will now hear from Professor Hager.

STATEMENT OF MARK M. HAGER, ASSISTANT PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. Hager. Good morning Mr. Chairman, Senator Rockefeller. I am pleased to be here this morning. I am a Professor of Torts at American University Law School. I am going to depart from my submitted testimony and address some points that have been made that I think have not been adequately covered.

Several of the witnesses this morning have testified on behalf of the bill in terms of its superior advantages for supplying uniformity. I would like to comment on that. First of all, the problem of nonuniformity in our product liability system is not a result of widely disparate laws in the 50 different jurisdictions.

In fact, the laws in the different jurisdictions are not all that different, and the disparities in judgments and in awards stem primarily not from any legal differences amongst those jurisdictions but from the variabilities of individual judgments in specific cases, the specific dimensions of specific cases, award judgments and so on which are in part made variable by the jury system.

The bill S. 1400 will do nothing to lend actual greater uniformity to our product liability system because it does not alter the fundamental cause which drives nonuniformity in our system.

Some comments on competitiveness. We hear anecdotes about products which are out-priced in international competition because of the cost of product liability. We have to keep in mind, in balanced perspective to that, that our products, because of their superior reputation for safety, due in part to the effects of product liability over the last 20 years, have a superior reputation in the international marketplace and we do not know, we simply do not know whether the anecdotes of lost business because of pricing effects in the international market do or do not outweigh the competitive advantages that extra safety supplies to our products.

We cannot compete at this time with the low labor costs of newly industrializing countries, but we can compete very effectively and we are competing very effectively in safety, and it would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage.

We can also look at our own domestic market and ask what would happen if we reduced the liability exposure of foreign manufacturers doing business in our market. We know that many foreign manufacturers, despite our tort liability system, are eager to do business in our market, but we can surmise that many foreign manufacturers who cannot meet the stringent safety standards of the U.S. tort liability system are kept out of our market by fear of lawsuits.

What happens when we reduce the level of damage exposure that those foreign manufacturers face? They are then freer to enter our market and flood our shelves with exploding coffee makers and flammable televisions, and our consumers who are used to the level of product safety that they now enjoy will have to inform themselves, and many will be injured.

Our manufacturers, who have already spent money on safety improvements over the last 20 or 30 years, will have to spend more money to educate consumers about the differences between high-quality American products and foreign products.

On the matter of innovation, we have heard about the possible effects of tort liability in deterring the bringing to market of beneficial products and I believe it is possible that the U.S. tort liability system has that effect. Nothing about S. 1400 solves that problem in any way. That problem is inherent to any system of product liability.

Any system of product liability which has an effect of screening out unsafe products also may have an effect in sometimes screening out beneficial products. You do not and cannot solve that problem by reducing the level of damage exposure that manufacturers face.

We must focus not just on anecdotal incidents of good products possibly being kept from the market. We need to look at the average effect of tort liability. Is its average effect to screen out more unsafe products than safe products? That cannot be discerned from a recital of anecdotal stories of good products that have been kept off the market.

If we focus on averages, it is clear that across-the-board reductions in liability exposure will not favorably alter the nation between safe and unsafe products. Across the board reductions are more likely to give advantages to unsafe products than to safe products. To clarify, as you increase damage exposure, you increase the relative probabilities that makers of unsafe products will face large damage judgments, because they are the ones which will generate the most lawsuits. Hence, increased damages will tend to favor safer products on the average.

Conversely, if you reduce all tort damages to zero and allowed no tort recovery for product liability, unsafe products would enjoy the maximum advantage over safe products because even the most unsafe products then would not be screened from the market by liability fears. Any tort liability system that you generate in order to generate a disincentive to unsafe products may sweep in some safe products, but you need to look at the average effect.

There is a potential problem of beneficial products being kept off the market. Some good products may be screened out by this system. What do we do about that? In theory, the fine-tuning could be accomplished through a well-working insurance system in which the rates that different products would face in the insurance market would reflect the safety experience of those products.

We do not have a well-working insurance system in the product liability field. That is in part inherent, because one is always dealing with new products as to which the actuarial data in order to make better insurance judgments is not available, but that is an inherent problem to any product liability system, and it is a problem which is not solved in any way by any of the measures of S. 1400.

My time has run out.

[The statement follows:]

from industrial progress. It is easy in retrospect to see the short-sighted and misguided character of such thinking. Compensation payments, besides alleviating the plight of the afflicted, actually help spur technological progress in desirable directions by giving manufacturers and employers tangible monetary incentives to pursue safety.

In discussion of S.1400 and similar bills there is talk of all kinds of deleterious consequences which supposedly flow from our tort liability system. One of today's scheduled witnesses, Mr. Huber, has written a book which purports to chronicle these awful consequences. Unfortunately, not only this book but other writings of a similar nature have gained influence in the Congress and elsewhere far out of proportion to the objective merit of the arguments and evidence raised. I have published a detailed critique of Mr. Huber's book in the January 1990 issue of the Stanford Law Review. I submit that article, along with my testimony, for inclusion in the record. This is not the time or place to address the full range of issues discussed there. I will confine myself to a limited set of observations, with the simple purpose of calling into question the simple-minded conclusions drawn by those who seek "tort reform" through roll-backs on liability. I would be the last to defend the American tort system as an ideal or perfectly rational one. But the system should be defended from those who, out of interest or ill-founded zealotry, would have us fix the system where it ain't broke.

SUBMITTED STATEMENT: PROF. MARK M. HAGER

Mr. Chairman:

I am Mark Hager, Professor of Law at American University and a teacher of Torts. I am pleased to be here this morning with an opportunity to comment on S.1400. Passage of this legislation would have deeply unfortunate effects on the legal rights and personal safety of millions of American consumers. At the same time there is little or nothing to show that benefits promised by advocates of this legislation are at all likely to materialize. This is because there is no serious evidence that the negative effects sometimes ascribed to current American tort liability law actually exist. The legislation before the Committee is but the latest round in a long effort among segments of the manufacturing community to reduce safety responsibilities and the financial burdens of compensating injury victims.

A glance at the history of tort reveals a long train of arguments which have been deployed successively to restrict injury compensation. In the nineteenth century, for example, under the sway of the infamous fellow servant rule, workers injured on the job by co-worker's' negligence were barred from holding the employer responsible for such an injury. Uncompensated injuries were widely and erroneously thought to be the necessary price paid for industrial progress. Industry could not be had without injury. The monetary claims of the injured should be ignored, since to honor them would divert resources

COSTS

We have heard and will continue to hear a great deal about the enormous costs tort liability inflicts on our economy. Such discussion, if not carefully analyzed, tends to convey a picture of tort liability as an enormous dead-weight inefficiency in the economy. To avoid being over-swayed by these images, it is important to keep perspective. First, injury compensation is not economic waste in the manner of throwing money down the sewer. It goes toward alleviating the plight of injury victims suffering in our midst. Second, common figures on the annual cost of tort liability should not be believed except after the most careful scrutiny. For example, the figure of $300 billion for the annual cost of tort liability has begun to circulate, a figure of recent vintage tracing specifically to Mr. Huber's book. As my article explains, this figure has no validity whatsoever and probably exaggerates the actual figure by a 10-fold multiple or more. Unfortunately, our press and too often our lawmakers have fallen prey to the intrigue of sensational numbers. In this area, the proverbial warning about lies, damn lies, and statistics has proven itself all too accurate.

INSURANCE

In recent years, there has been an extensive hue and cry over a "crisis" in liability insurance. This alarm has spawned initiatives in many states to secure so-called "tort reform," legislation which in various ways restricts tort liability and places "caps" on damage awards.

Despite widespread alarm in the early 1980s, prophecies of a "collapse" of the U.S. liability insurance business were exaggerated. In fact, by mid-decade, the industry was posting record profits. Insurance industry propaganda has often portrayed the "insurance crisis" as a deep threat to insurance profitability posed by excessive tort liability. Evidence suggests, however, that no "insurance crisis" of this sort really exists. Instead, insurance interests have blamed tort liability for intervals of poor profit actually stemming from other causes. They have meanwhile used the excessive liability notion to justify price hikes, coverage cutbacks, and legislative "tort reform." There was no chronic profit shortfall to be alleviated by such measures. There was, instead, a basically profitable industry that became even more profitable. The insurance industry did experience a profit crunch during the years 1981-1983 but, as industry studies themselves acknowledge, this crunch was not the result of expanded tort liability. In the climate of high interest rates that prevailed in the late 1970s, insurers sought to expand their investment levels in order to capitalize on returns yielded by high interest rates. To generate investment capital, they maximized premium inflows by aggressively writing coverage. The competition for the coverage markets which generated premium inflows led the insurance firms actually to slash premium prices. Profits then plummeted in the early 1980s as investments soured, at the same time that premium prices were at rock bottom. Insurers then scrambled to restore profitability through price hikes and cost cutting, including coverage cutbacks. By 1986, the industry was posting record-high profits.

The profit crunch of the early 1980s prompted insurance industry pressure on state regulators and legislatures; these pressures led to successful rate hikes and "tort reform" proposals. Some states apparently passed "tort reform" with the hope of alleviating upward insurance cost pressures supposedly exerted by runaway tort liability. In the aftermath, however, insurance studies now claim the new "tort reform" laws actually create no significant opportunities for rate cutting. Premium charges, industry studies now tell us, are scarcely affected by the liability payouts curbed in "tort reform" schemes. Far from solving a public crisis in insurance rates, "tort reform" begins to look more like a windfall for insurers, paid for at the expense of tort victims.

COMPETITIVENESS

Just when it seemed we were beginning to hear less about the insurance crisis, we began to hear more about how expansive tort liability, by hiking costs to U.S. manufacturers, is ruining the competitive position of American business with respect to its foreign competitors. With all the excitement over this issue, it is remarkable how little hard evidence there is to substantiate the charge. What we do have is anecdotal tales of American manufacturers outcompeted by firms from lands with lower liability costs. I will have more to say about such anecdotes in a moment. Lest we be carried away by such anecdotes, it is important to keep in mind actual studies like the one recently completed by the Office of Technology Assessment. In assessing the dimensions of American competitiveness problems, that study finds liability costs not even worthy of mention.

Though I am far from an expert on the topic of international competition, it does not take an expert to realize that the bogeyman stories of liability costs leave far too much out of the picture. It is entirely possible, for all anyone knows, that the American tort system actually augments rather than hampers our competitiveness. Evidence suggests that American tort liability has impelled manufacturers toward the creation of safer products, by providing negative incentives against laxity on safety. The superior safety reputation of American manufactured products may help augment our markets over competitors with lesser reputations.

In fact, safety may be one of the areas where America competes best in a changing world economy. American manufacturers cannot easily match the low labor costs of newly industrializing countries. We can, however, compete and compete well in safety and our tort system is part of what drives us to do so. If so, it would be sheerest folly to modify our tort system at risk of sacrificing one competitive advantage we can easily continue to enjoy. We may hear stories of how high liability or insurance costs have sometimes caused American firms to lose out. If true, those stories should be balanced against other stories we may be less likely to hear about, stories of how U.S. products were chosen because buyers understood them to provide a measure of protection against the devastations and economic losses of unnecessary product dangers.

There is another way in which high U.S. damage awards may well enhance the position of high-safety U.S. products in competition with low-safety foreign products. The spectre of high damage payments for faulty products sold in the U.S. market may deter penetration of our domestic markets by inferior and dangerous goods. As we know, foreign companies are often not amenable to liability suits because they lack sufficient U.S. contacts or else their contacts occur through shell companies with insuffient funds to satisfy judgments. This may have the effect of subsidizing low-safety foreign products at the expense of high-safety U.S. products. If so, efforts to redress this asymmetry may be necessary.

Passage of S.1400, however, could quite likely exaccerbate the problem rather than alleviate it. Reduced liability exposure might tempt foreign makers of unsafe goods more heavily into the U.S. market, forcing U.S. makers of safe products to lower standards in order to compete or else make special expenditures to emphasize superior safety to unwary U.S. consumers with their increasingly habitual confidence about product safety. Why should high-safety U.S. firms who have already devoted resources to safety improvements be forced to expend additional resources defending markets against unsafe imports? Yet precisely this could be the result of passing S.1400 or other similar legislation.

As a final note on the competitiveness issue, I should note that there is nothing special in this regard concerning tort liability. It has become a virtual sport to attack U.S. business regulations of all kinds as threats to our world competitive position. Workplace safety regulations, auto emissions standards, even the tax non-deductibility of bribes paid to corrupt foreign officials have all been attacked at various times under the rationale of protecting U.S. competitiveness. Each time such issues are raised, we face essentially the same problem. Should lowest-common-denominator economic and moral standards govern the framing of U.S. policy, or should the U.S. pursue its own rightful course and ensure competitive viability through excellence in its business institutions and through government and multilateral efforts to secure a fair international trade environment?

INNOVATION

Overly-expansive tort liability, we hear, chills the development of innovative technologies and products, by saddling them with the possibility of huge damage losses. The purported substantiation for this charge consists primarily of surveys in which business decision-makers report having discontinued products or failed to develop them due to liability fears. Obviously, however, such surveys tell us nothing of the extent to which the lost products represent things we really should have, as opposed to things we are in fact better off not having because they are too dangerous. Even if it is true that our expansive tort system sometimes winds up fencing out safe and desirable products, the overall effect would nevertheless be positive if more bad products than good products get screened out. Moreover, it stands to reason that it is the most dangerous products which are most likely to be screened out by expansive liability exposure.

It may sometimes be the case that products screened out will be less dangerous than the products they would have supplanted or the conditions they were intended to alleviate. In those cases, of course, the product loss may be deemed unfortunate. The bill before the Committee, however, does nothing to address this problem specifically. Liability roll-backs, such as that effectuated by the bill, may mean that fewer products are screened out, but do nothing at all to ensure that the rescued products will be the ones most worth rescuing. Instead the bill reduces the damages assessed against all products, safe and unsafe.

To ensure that truly beneficial products become and remain available, the proper approach is not to amputate victim compensation, as S.1400 in several of its provision does, but rather to take affirmative steps to ensure that beneficial products remain on the market, despite liability and insurance problems. An affirmative approach may require government to step in more frequently to replace manufacturers in making liability payments, or else government regulations requiring insurers to handle risks they prefer to shun. The current bill, by contrast, bails out safe and unsafe products alike at the ultimate expense of injury victims.

CONCLUSION

The arguments for bills such as S.1400 -- that expansive U.S. tort liability imparts unacceptable deleterious consequences -- are not supported by substantial evidence. In particular expansive liability cannot be substantially linked to problems in U.S. competitiveness, nor to any actual "insurance crisis," despite all the publicity which has been given to these supposed connections. These alarmist arguments are part of a roster of anti-liability arguments which seem to find negative consequences of the tort system almost everywhere. Mr. Huber's book, for example, blames tort liability for retarding technological advances and for undermining safety progress, but the evidence for these claims turns out upon examination to be exceedingly flimsy, amounting to little more than anecdotes, anecdotes capable of a variety of interpretations.

I urge the Committee not to approve S.1400 and I urge the Committee in the future to apply exacting criticism to the large body of literature blaming expansive tort liability for all manner of ills. The volume of this literature is almost in itself enough to persuade many of its probable validity: where there's smoke there's fire, as they say. Close examination, however, reveals this literature to be largely a tissue of rumor, with unsubstantiated allegations gaining through exhaustive repetition the status of validated fact.

The American people will not thank the Committee for amputating its safety-enhancing and humane system of legal rights on the basis of unsubstantiated and exaggerated ills. Thank you.

In previous hearings in these halls, insurance is about all we heard about, and the real predicate for why even this is before Congress were the two so-called liability insurance crises of the mid-1970's and the mid-1980's. During the mid-1970's crisis insurers raised their prices, they lowered their coverage, they achieved considerable numbers of tort law changes, then they made massive profits, following that.

But when the profits reached excessive levels the tort reform rhetoric ended, the prices for liability insurance fell, sometimes dramatically. For example, the liability insurance that covered the MGM Grand Hotel fire in the early 1980s was written after the fire happened, yet the insurance industry blamed the tort system for their woes in the 1970's and again in the 1980's.

Only occasionally did the truth actually slip out. For example, when the President of the International Group, Mr. Greenberg, said, "If we had not cut our prices to the point of absurdity, there would not be all this hullabaloo about tort reform," and in the earlier 1980's when one of the chief officials here in Washington, head of GEICO, said "It is right for the industry to withdraw from the market and let the pressure for reform build in the courts and in the legislatures."

This is what was going on, and this is why we are even in this debate. Insurance is at the core of it, and yet we do not hear a discussion of that. We hear this new phrase, "competitiveness." It is actually an old phrase that was once used, about ten years ago, in some of these same debates. It is being recycled as a new phrase.

The fundamental factor underlying the reason we have these crises is the insurance industry's profit cycle. Insurers engage in periods of competition, where their real price premiums are lowered for commercial business. They are in fact being lowered now in liability insurance, including product liability insurance, and have been for the last two or three years, and we are setting the stage for our next liability crisis which I predict will happen in 1991 or 1992, having nothing to do with juries doing anything, but having a lot to do with insurers cutting prices today.

The key cause of the cycle, the key exacerbation of the cycle, is the McCarran-Ferguson Act. S. 1400 would not impact product liability insurance costs or availability at all. Even stronger action by Congress would not impact, in my estimation.

For example, in Florida in 1986 they passed very strong tort reform. They changed the collateral source rule, they did joint and several, they limited noneconomic damages to $450,000, they limited punitive damages, they required periodic payments and the like, and they also required insurers to make rate filings.

So here is the rate filing from Aetna, one of the leading proponents of tort reform. This is direct from their rate filing which was attached to my testimony, and you can see how they priced out these various tort reforms when they had to actually put a pen to paper and say how much it was worth.

They said that these things—for product liability, collateral source offset, zero, joint and several, zero, limitation on noneconomic damages, zero, and punitive damages zero. Future economic damages at $250,000 paid at present value, zero. These are facts. We looked at several hundred rate filings in Florida and there

Senator **Rockefeller**. So your entire response to the so-called new products problem which is called the competitiveness of America is that there is something that we have to do with insurance and it will get straightened out. That is your entire response to the new products problem?

Mr. **Hager**. That is not my entire response. That is part of the response.

Senator **Rockefeller** That is all you gave.

Mr. **Hager**. The insurance industry I believe can do more to develop the science of writing effective liability insurance for products. Federal regulation, dare I say it, could help impel the industry in that direction.

As an alternative approach, the use of government liability similar to what has been done with vaccines could be expanded in situations where it is judged that a particular product, or a particular line of products, is so valuable that the public needs to get those products. Then the Federal Government, as it has done in the case of vaccines, could step in and underwrite those products on a case-specific basis.

I guess my summary point here is that if the problem is anecdotal, specific products being kept from the market when they should not be, the solution is probably case-specific. A solution which rolls back liability across the board is liable to have an average effect of giving more advantage to unsafe products than to safer products.

Senator **Bryan**. Thank you very much, Professor Hager.

Mr. Hunter, you are batting cleanup.

STATEMENT OF J. ROBERT HUNTER, PRESIDENT, NATIONAL INSURANCE CONSUMER ORGANIZATION

Mr. **Hunter**. Thank you. My name is Bob Hunter. I am President of the National Insurance Consumer Organization, and formerly I was a Federal insurance administrator. You have accomplished something today that is sort of a watershed, I believe—man bites dog for the reporters—because today I am going to agree with the American Insurance Association that S. 1400 is unlikely to reduce insurance claim costs or improve the insurance market. That is the essence of my testimony.

I am rather amazed that I find myself in agreement. I have to go back and rethink my previous prepared remarks, I think, but I agree totally that S. 1400 will have no effect on insurance availability and on affordability and on claim costs, so that means on self-insurance either.

Make no mistake about it, if insurance costs and availability are not improved, competitiveness is not affected. Manufacturers could enhance competitiveness in the insurance industry by supporting repeal of the antitrust exemption for the McCarran-Ferguson Act, but they choose not to, although the American Bar Association, American bankers, nurses and others have supported that.

Interestingly, the trial lawyers also do not support that, because they like to have the McCarran Act as a whipping boy, but manufacturers fear the trillion dollar insurance industry, so they do not support antitrust reform, nor do they even mention the "I" word when they discuss S. 1400.

were some modest reductions in a couple of them, but the overall effect was less than 1 percent, and in fact in States where there was no tort reform prices began to fall at the same time as they did in States where there was.

Interestingly, in the Province of Ontario, which sort of has the dream of tort reform, in Canada, with all of the European rules—no contingency fees, no juries and so on—the liability crisis was identical to that in this country, because it is driven not by the tort law but by the insurance industry economic cycle.

So in order to achieve the insurance price drop you seek, it seems to me that you must do some things to S. 1400. At least you ought to add a data collection section to obtain information on costs from insurers and self-insurers to see how they react to your changes. You should monitor to make sure that any savings your changes bring about are passed through to consumers. I cannot imagine that you would be satisfied, in the name of competitiveness, to enact this bill and let insurers or self-insurers pocket any savings and not pass them through. How would that help competitiveness?

The product liability insurance issue has been put on the national agenda by two liability crises caused by insurers and price-fixing allowed by the McCarran-Ferguson Act, not because of the tort law. S. 1400 will not lower insurance costs, as we have remarkable agreement between normal opponents saying before you today, and it is irrelevant to international competitiveness, in my view.

Congress should get about the business of doing things like fixing the antitrust exemption and reject S. 1400.

[The statement follows:]

STATEMENT OF

J. ROBERT HUNTER
PRESIDENT,

NATIONAL INSURANCE CONSUMER ORGANIZATION

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss S. 1400, the "Product Liability Reform Act."

My name is Bob Hunter. I am President of the National Insurance Consumer Organization (NICO); formed in May, 1980 to educate consumers, undertake public policy research and speak out on insurance matters. Prior to forming NICO, I was the Federal Insurance Administrator and Chief Actuary of the Federal Insurance Administration between 1971 and 1980.

I had previously been involved in ratemaking at rate bureaus during the 1960's, including establishing prices for product liability insurance that many insurers used as a basis of their pricing of this insurance product.

I. Purpose of Testimony

I have been asked to testify before you today as to whether S. 1400 would make the manufacturing sector more competitive in the world market. Let me be very clear about this -- S. 1400 will have zero effect on insurance availability and affordability.

When manufacturers complain about their lack of competitiveness, they are really complaining about the costs of insurance. The only bill presently before this Congress to deal directly with competitiveness in the insurance marketplace is legislation before both Houses that would repeal or significantly amend the insurance industry's exemption from the antitrust laws. Astonishingly, the manufacturers are not supporting the only real attempt to make the insurance market more competitive.

I understand that manufacturers will not join us in efforts to get rid of the outmoded antitrust exemption because they fear the wrath of the trillion dollar insurance industry. Instead they focus their frustrations with the excesses of the insurance industry on victims who are not always able to speak out and fight back. They turn their attention to legislation which will not even require the insurance industry to disclose any information concerning tort theories and product liability payouts, much less require insurance prices to fall or insurance products to become more easy to buy.

So afraid are the manufacturers of the insurance industry that this year's product liability effort for the first time does not mention insurance prices as a justification for limits on legal remedies. This year no one pushing S. 1400 even mentions the "I" word. I would like to explore the "I" word and its relationship to product liability reform with you this morning.

II. *What is the genesis of the product liability issue before Congress?*

A. Insurance Crisis Number 1 - the Mid-1970's

During my tenure at the Federal Insurance Administration, the liability insurance crisis of the mid-1970's occurred. During this "mini-crisis" (mini in comparison to the later mid-1980's version, discussed below), cities, professionals and businesses saw their insurance prices sharply rise and some had difficulty in securing certain forms of insurance. Product liability was one of the troubled lines of coverage.

The insurers blamed the trial bar for their plight and public policy makers were quite confused as to what was really going on. For example, the Washington Post of November 3, 1976 editorialized:

> "It is becoming increasingly apparent that liability insurance -- or the lack of it -- is becoming a national problem. . . . because of the price now placed on it, many small companies are dropping the product liability insurance they though they needed. . . ." (emphasis added)

In the specific line of product liability insurance, the federal government undertook a study of the causes of the price jumps and an interagency task force -- headed by the Department of Commerce -- was formed. I was fortunate to participate on this task force.

Although I believe that if God had said "let there be an interagency task force to study light" rather than "let there be light" we would all still be groping in darkness; the task force was able to draw some meaningful conclusions. We found that insurers had, we thought, panicked. 1/

During the 1970's crisis, insurers raised prices, lowered coverage, achieved favorable (to them) tort law changes and made massive profits in subsequent years. But then, when profits reached excessive levels, all the tort reform rhetoric subsided, prices for insurance fell and insurance became very, very easy to get.

At this top of the cycle in the early 1980's, the dreaded liability insurance policy rates were being slashed wildly and even being sold after the insured event happened, such as in the case of the MGM Grand Hotel fire where liability coverage was written months after the fire. 2/ Chart #1, labeled the "National

Insurance Strike," shows the effect of rate cutting during 1981 and 1982 upon the profit levels of insurers. As you can see, the insurers cut about $1.5 billion in premiums over this interval and the resulting impact upon insurers profits was vastly significant -- they plummeted. Chart #2 shows the profit levels insurers would have enjoyed had insurers not cut their premiums, but only maintained them at 1981 levels. Chart #2 shows great disparity between actual profits and those able to have been realized had insurers simply held the line on premiums. Obviously, if premiums were increased at the same level as, say, the Consumer Price Index, insurer profits could have been even higher than the levels indicated in Chart #2. The national problem of insurer profits was clearly and convincingly self-inflicted.

Yet the insurance industry blamed the tort system for their economic woes. Only occasionally did the truth slip out, as when the President of the American International Group, Mr. Greenberg said "If we had not cut our prices to the point of absurdity, there wouldn't be all this hullabaloo about tort reform."

B. Insurance Crisis Number 2 - The Mid-1980's

Although some were alarmed by the mid-1970's crisis, the mid-1980's crisis was much deeper and broader -- but it was not due to the panic of insurers but careful planning by insurers.

I have attached for your reference a "chronology of crisis creation," (Exhibit A). In late 1984 the Insurance Information Institute began to "market the idea that there is something wrong with the civil justice system. . . to convince thought leaders that the system needs to be changed in order to eliminate the costly, burdensome abuses that ultimately come to the consumer of insurance in the form of higher insurance premiums."

Early in the 1980's crisis, one property/casualty official stated that: "It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures." 3/

Insurers, it seemed, had learned from the mid-1970's experience. They could monumentally raise prices, cut coverage, they could blame the lawyers and make massive profits in the aftermath. So they expanded the crisis playing field to several of the yuppie items: day-care centers lost coverage, cities closed parks and swimming pools, school districts had monumental price increases. Time Magazine's cover story was "Sorry America, Your Coverage is Cancelled." But this time the insurers did not achieve a clear victory -- they are still paying a dear price for their behavior in public outrage and political action against insurers from coast to coast.

C. What Really Caused These Crises?

The fundamental factor underlying these crises is, the property/casualty insurance industry's profit cycle. As Chart #3 shows, insurers engage in phases of competition where their real premiums are lowered for commercial business and in periods where competition evaporates and the rate bureau rate is charged by most insurers. The cycle has existed for decades -- and a new cycle bottom is likely, I believe, in 1991 or 1992. As Exhibit B shows, premiums are falling once again in the other liability insurance lines (which includes product liability insurance).

I believe that the key cause of the cycle is the McCarran-Ferguson Act's antitrust exemption and the existence of jointly agreed to prices.

Were the industry subject to the antitrust laws, it is doubtful whether the industry's price increases would have been as excessive or its cancellations as broad -- and it is doubtful whether the cries of "civil justice reform" and the scapegoating of the tort system would have been as organized.

When insurers know that the Bureau rates will grant massive profits if they can just hold on to their market share until the point where the industry stops competing, the industry will price below cost to hold market. Thus the McCarran-Ferguson Act exacerbates what should be a more moderate cycle, since there would be no guaranteed safe rate set by the Bureau and individual insurers would make these pricing and timing decisions, not in concert as today.

As long as the McCarran-Ferguson Act exists insurers _will_ fix prices -- which as the attached chronology indicates, they did determine in December 1984 and January 1985.

If insurance "crises" are going to be prevented in the future, then the McCarran-Ferguson Act must be repealed. NICO urges Congress to enact legislation repealing or sharply curtailing the antitrust exemption.

III. _How Would S-1400 Impact the Affordability of Product Liability Insurance?_

I don't believe S-1400 would impact product liability insurance cost or availability at all, because insurers simply refuse to link prices or availability to such reforms. The driving force behind prices and market softness or hardness for product liability insurance is much more related to the insurance cycle than to the tort law.

The enclosed documents help answer the Subcommittee question. Exhibit C, prepared by the Aetna, one of the nation's largest commercial liability insurers and one of America's most avid tort reform proponents, and Exhibit D, from the St. Paul, the nation's largest medical malpractice insurer, both carefully analyzed the tort reforms that were enacted in Florida in 1986 and concluded that they would not reduce insurance rates.

For example, the Aetna document analyzes the following limitations, which it has been lobbying for throughout the nation:

(1) reducing compensation to injury victims by the amount of compensation from collateral sources;

(2) restricting the doctrine of joint and several liability;

(3) limiting compensation for paralysis, disfigurement and other types of non-economic damages to $450,000;

(4) limiting punitive damages; and

(5) requiring periodic payment of future economic damages of more than $250,000.

The Aetna document, excerpts from a rate filing proposed to take effect January 1, 1987, explains why each of these provisions will have little or no effect on insurance rates; including product liability insurance. Eliminating the collateral source rule, for example, will have a negligible effect on insurance rates because "current Aetna claim settlement practices recognize, in part, the existence of collateral sources a part of the negotiating process used in arriving at a mutually satisfactory damage value with the plaintiff." Restricting joint and several liability will not reduce insurance rates "due to the interaction of economic damages sustained by the plaintiff, the percentage of liability assigned to Aetna's insured, and the policy limits purchased." And limiting compensation for "non-economic" damages will not lower insurance costs, according to Aetna, "due to the impact of policy limits, and the actual settlement reached with the plaintiff."

Finally, Aetna concludes, limiting punitive damages will have "no impact" on Aetna's claim values, and requiring periodic payments of future economic damages over $250,000 will yield "no net savings" because of the "interaction of policy limits, past economic losses, and future economic losses," the "settlement value of the case, and the "apparent implicit recognition of the periodic nature of future damages."

The St. Paul conducted an analysis similar to Aetna's and reached similar conclusions. The St. Paul found that 4 of the 313 closed claims it analyzed would have been affected by the "tort reforms" enacted in Florida, "for a total effect of about 1% savings." The St. Paul further explains that the 1% savings estimate probably overstates the effect of tort reform.

If you can reach the conclusion that I can't, that is, the price of product liability insurance in the United States is somehow related to our international competitiveness, then the only way to achieve competitiveness is to build a guaranteed rate reduction requirement right into the bill and regulate the insurers to be sure it is achieved.

Given the fact that a much tougher law change in Florida produced no savings, it is doubtful that insurers would agree to a rollback based on the far weaker provisions of S-1400, even for American lawsuits (S-1400's change in American law can hardly result in reduced costs for claims in other countries).

In order to achieve the insurance price drops you seek, you must at least add a data collection section to obtain information on costs from insurers and self-insurers alike. You must monitor to be certain that any savings these changes bring about are passed through to consumers. It would be totally inappropriate if, in the name of "competitiveness," you enacted this bill and insurers or self-insured product manufacturers kept as profit any savings thus achieved.

IV. Conclusion

Mr. Chairman, the product liability insurance issue has been put on the national agenda by two liability crises caused by insurer price-fixing allowed by the McCarran-Ferguson Act, not because of tort law problems. S-1400 will not lower insurance costs in this country and is irrelevant to international competitiveness.

Congress should reject S-1400 and get to work on fixing the serious problem of the insurers' antitrust exemption.

FOOTNOTES

1/ Final Report, Product Liability Task Force. Report on Product Liability Ratemaking, Product Liability and Accident Compensation Task Force, U.S. Department of Commerce, 1980. At page ix of the Report states that "overly subjective ratemaking practices were one of the principal causes of the product liability insurance problem."

2/ See, for insurance, the National Underwriter, 11/20/81, page 1, where it says:

> A large commercial umbrella (liability) risk came up for renewal and was rated at $150,000, about the same as the previous year. But the insured was not satisfied. Aware of the aggressive rate competition in the commercial lines market today, he decided to shop around. He approached a second agent, who submitted the very same risk to a different company, which offered to write it for just $20,000.
>
> But the insured was still not happy. He continued shopping and eventually the original company, which originally wanted $105,000 came back and took the business for $5,000. Than's right, $5,000. (emphasis added.)

3/ Journal of Commerce, "Insurers Told: Exit Some Lines," p. 8A, (June 18, 1985).

CHART 1

NATIONAL LIABILITY INSURANCE STRIKE

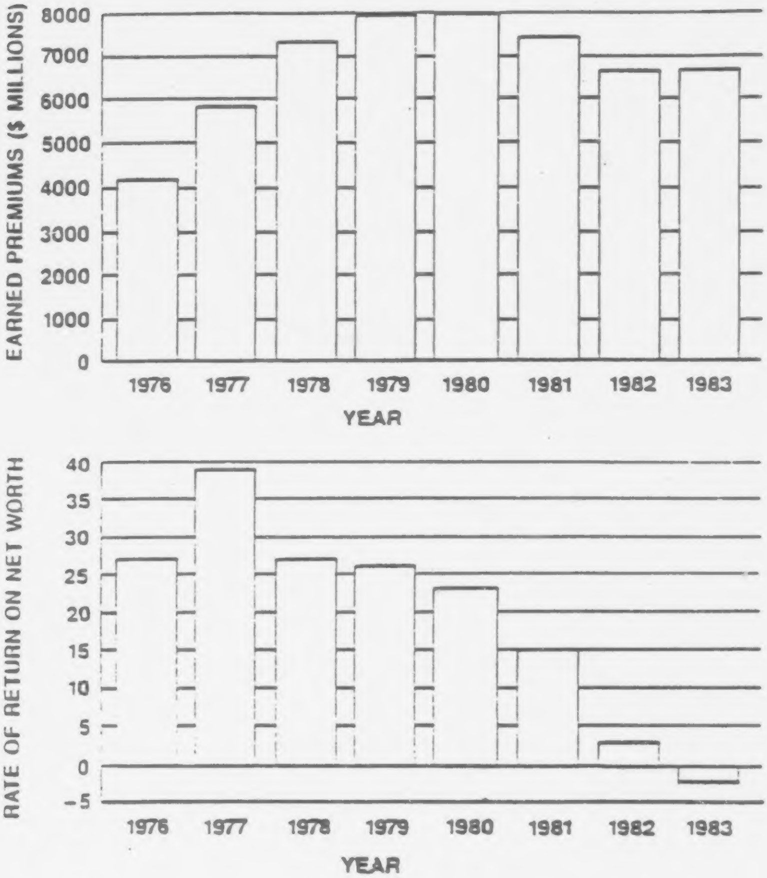
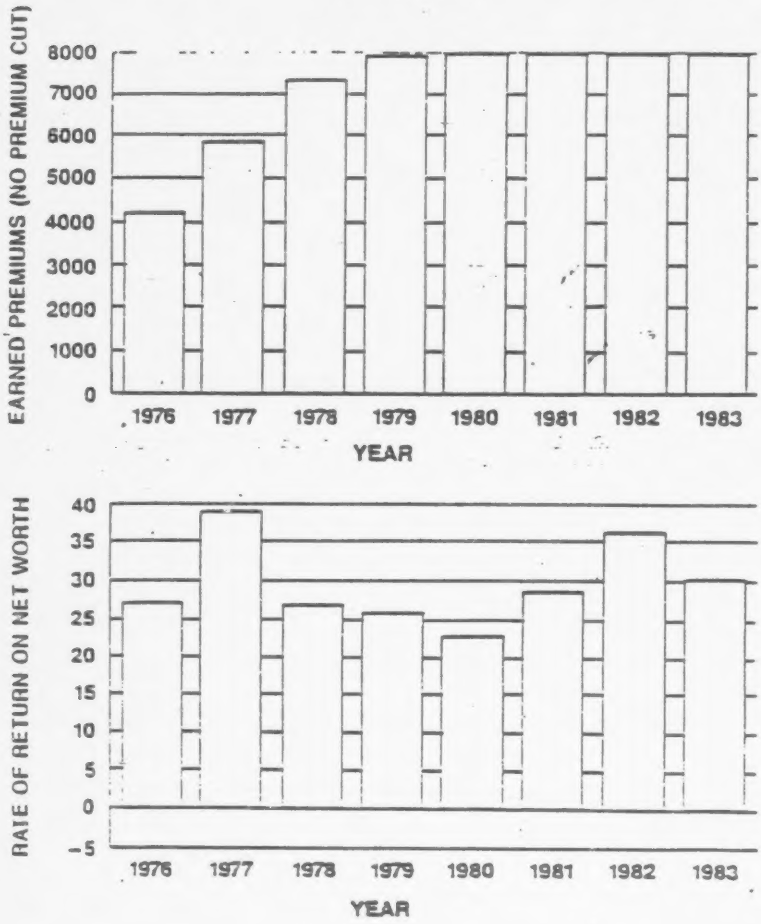


CHART 2

NATIONAL LIABILITY INSURANCE
STRIKE II



Senator **Bryan**. It was clear from your testimony, Professor Hager, both written and oral, that you do not think a whole lot of this legislation. You made the comment, and I am paraphrasing, nothing in this legislation brings about the uniformity which the advocates are calling for. If that is essentially the thrust of one part of your testimony, it seems to me that that does not square well with the facts.

Whether this legislation does all that is claimed to be done, pretty clearly does it not set a uniform standard in terms of recovery for punitive damages in terms of a standard of proof, a quantum measure? It does set aside an alternative resolution procedure which may not be available in all states? It does set forth some rules with respect to joint and several liability. Does that not at least partially address the uniformity which the advocates for this legislation believe will improve the product liability climate?

Mr. **Hager**. I think the effect, if any, will be de minimis, Mr. Chairman. I will address——

Senator **Bryan**. I understand your testimony, but the uniformity argument, does this at least move us in the direction of uniformity?

Mr. **Hager**. It imposes some uniform legal standards, Mr. Chairman, but the problem of fluctuating damage judgments is not primarily a problem of different legal standards among the jurisdictions. It is a matter of different outcomes of jury trials.

Insofar as the bill addresses different outcomes of jury trials, it might have some incremental effect on increasing uniformity. You mentioned punitive damages, placing a limit on punitive damages. If punitive damages were a major factor in product liability litigation, placing a limit on punitive damages would achieve some measure of uniformity. In fact, punitive damages play a very small role in product liability litigation.

A study done by Landes and Judge Posner who sits on the Seventh Circuit indicates that punitive damages are involved in less than 3 percent of product liability suits which are reported at the appeals level. The appeals level would inflate the number of suits involving punitive damages because suits in which punitive damages are awarded are more likely to be appealed.

So the number of product liability suits in which punitive damages are awarded is very de minimis, and the limit on punitive damages, therefore, would have a very small effect on the overall problem of lack of uniformity.

Senator **Bryan**. Assume for the sake of argument that this legislation really does not do all that much from your perspective. Is there anything that is particularly dangerous about it? Is there any reason why we should not enact it and give it a try even though it might, from your perspective, not do all the things that some of the advocates claim?

Mr. **Hager**. I do not think it will do anything at all, very seriously, which the advocates claim, and its vice is that it is going to sacrifice the compensation prerogatives of American consumers who are victims of dangerous products.

Senator **Bryan**. How so, Professor Hager? Where is the sacrifice?

Mr. **Hager**. A couple of examples, Mr. Chairman. Section 307 near the end of the bill gives an absolute insulation from liability if alcohol or drugs are involved in the accident. We all know that alcohol and drug use are ubiquitous in our society. The effect of the bill would be to cut off liability in situations where alcohol and drug abuse or use are involved. That is a massive number of possible cases and potentially reduces the liability exposure of manufacturers drastically and, hence, drastically reduces their incentives to produce safe products in a safe manner.

Senator ROCKEFELLER. With deference to the Chairman, you are saying that we ought to really excuse alcoholics and drug addicts?

Mr. HAGER. The question is how can you best solve the problem. Is passage of section 307 likely to reduce the number——

Senator ROCKEFELLER. If you could answer my question.

Mr. HAGER. Yes. Is it likely to reduce significantly the number of accidents; in other words, does it address specifically the level of drug and alcohol abuse? No, it does not. It will not significantly reduce the number of accidents that are suffered. It will reduce the number of accidents in which the victims get compensation.

Now perhaps one's heart does not bleed for people whose accidents are suffered in connection with drug and alcohol abuse. Nevertheless, that is a very common manner in which accidents happen. Do we want to excuse manufacturers from foreseeing the possibility that such accidents will happen? It is certainly foreseeable. It is extremely foreseeable.

Senator ROCKEFELLER. So manufacturers must build into their products some sort of protection against drug addicts and drunks?

Mr. HAGER. Yes, in part because the same safety measures which reduce accidents for addicts and drunks will reduce them for everyone else as well.

Senator ROCKEFELLER. Interesting.

Senator BRYAN. Mr. Huber, let me ask you a couple of questions now, if I may.

In making a comparison between the continental system and our own legal system here, you point out, I think quite accurately so, that there are no punitive damages in Europe, there is no contingency fee recovery for lawyers, and that there are no jury trials there, that panels of experts are appointed.

Is that a system that we ought to follow in this country?

Mr. HUBER. I have a lot more sympathy for the jury system than many of the backers of this bill. I think if you ask juries sensible questions you will get sensible answers. I am generally a defender of the jury system. I think it is foolish to ask a jury whether we should be using the Salk or the Sabin polio vaccine and which is a better designed system.

I was brought up in Europe, but I am very much a dyed-in-the-wool American, and I believe in many aspects of our system. We had a very good and well-functioning system until we——

Senator BRYAN. So you support the jury system?

Mr. HUBER. I support asking juries the right questions, not asking them——

Senator BRYAN. Let us not quibble. Do you support the jury system as opposed to a panel of experts? That is my question.

Mr. HUBER. Well, Senator, that is like asking if I support the Federal budget. I support a good one.

Senator BRYAN. So you support a good jury system?

Mr. HUBER. Yes.

Senator BRYAN. OK. What changes do you want to make in the jury system?

Mr. HUBER. I would suggest that if you would like to see a bill that would have done a lot more than your current bill, I was here five years ago testifying in favor of one. I do not believe you were in that chair——

Senator BRYAN. No, I was not.

Mr. HUBER [continuing]. But others were.

I think if I were writing my model bill, I think it is not intelligent to ask juries design questions on complex pharmaceutical products. I would ask them negligence questions.

Senator BRYAN. So there are certain issues that you would not ask the jury?

Mr. HUBER. Yes, and I think some of them are addressed in this bill; not as many as I would like to address.

Senator BRYAN. How about punitive damages? Does that have a place in our system of justice in this country?

Mr. HUBER. Within range and under some kind of national uniform standards, yes. Our big problem today is the maverick jury. You have been told, and correctly so, if you look at the total dollar volume of punitive damages, it is quite a small tributary.

Now try telling that to Dick Mahoney when one jury in one jurisdiction can kill 10 percent of the value of his company in 1 day. One jury in Washington, DC, in one Bendectin verdict, ultimately squashed by a court, tries to award $97 million in punitive damages. That kind of runaway jury is exactly what we are trying to control and exactly the kind of uniformity this bill would address.

Senator BRYAN. So you support punitive damage with some parameters and some limitations?

Mr. HUBER. And some national uniformity, yes.

Senator BRYAN. How about contingency fees?

Mr. HUBER. I am not a strong opponent of contingency fees. If I were legislating, I would push it all the way; and in fact, your bill goes a small distance in that direction. Let there be some reward for filing a good suit and some penalty for filing a bad one. You have clauses in this very modest bill which do just that.

You file a good suit, you win, get your attorney fees. You file a junk suit or one where you recover very much less than a settlement offer that was made, and there should be some penalty on that. Your bill does that. It is a good provision.

Senator BRYAN. Mr. Hunter, you apparently agree that this piece of legislation will not affect the premium structure for product liability insurance?

Mr. HUNTER. Yes.

Senator BRYAN. Ms. Ballen, is that a fair statement as to your position, the AIA position, that this bill in its present form really offers no prospect for insurance premium cost reduction to those who obtain product liability insurance?

Ms. BALLEN. I would say it is not likely to. It could be that the bill is passed and the experience bears out that there is more of an effect on claim costs than we seem to think in looking at the bill right now, but in its present form, it does not appear to.

Senator BRYAN. Ms. Ballen, some of us had experience prior to coming to Washington in a different world at a different time. In

1986 the liability crisis was heralded as a major concern. It was not focused on product liability insurance, per se. It was a question of availability. It was a question of affordability. All of a sudden there was a crisis. There were advertisements placed in national periodicals saying that we must have relief, we must have relief. State legislatures around the country, in responding to the national clamor, convened hearings, in January of 1987 in my own state.

When the insurance industry was brought to the altar and asked whether or not any of those changes would in fact reduce the cost of insurance premiums, no such assurances were forthcoming. They said we really cannot say that it would.

Give me your assessment as to what happened during that time period in 1986–87 where we had the liability crisis, as it was called. Mr. Hunter has offered his own explanation, that there was an economic cycle in the insurance industry.

Some of the insurance industry's critics said that they had priced insurance at loss leader rates because of the high inflation and high rates of return on investment portfolios in the 1970s and that they really had not priced insurance properly in terms of cash flow versus claims payout.

Why not share with me your own perspective of that.

Ms. BALLEN. My own perspective is that I guess Mr. Hunter and I agree on two aspects but certainly not on everything that he said today.

Senator BRYAN. Your disclaimer is duly noted.

Ms. BALLEN. The insurance cycle was one of the causes for the liability insurance crisis of the mid-1980s. What we found, however, is that insurance is a cyclical industry. Prices do tend to go up, prices do tend to go down, and that is largely due to competition in the industry. The underlying tort system tends to exert an upward pressure the whole way along so that while prices may be operating in a cycle, that cycle is ever increasing, so that as long as the tort system is a more and more expensive tort system, over all, average over years, over time, the insurance system will be a more expensive insurance system.

I think while there is some influence of the cycle, a lot has to do with just what the tort system is and not only in terms of tort law doctrines. How much does it cost to repair people? One thing we found is that medical costs have escalated over the last ten years, and that is another factor, that while there will continue to be insurance cycles, as long as those underlying costs go up so will the underlying prices of insurance.

Senator BRYAN. Ms. Ballen, in the context of the product liability system, what kind of changes could be made in which you would testify today that if this is done I can represent to this subcommittee and to the insureds that are involved in manufacturing products for sale and distribution in the marketplace that there would in fact be a reduction in insurance premiums for that coverage?

Ms. BALLEN. I cannot promise categorically that if anything is done there will be a decrease in liability insurance premiums. I can only identify for you the types of changes that are likely to have a beneficial impact on claim costs.

Some of those issues are addressed in the bill, although not necessarily addressed in a way that is likely to have the maximum benefit. A couple of examples would include the joint and several liability provisions of the bill, which as I understand the bill are limited to noneconomic damages. If those were extended to include all damages, that would likely have a greater impact on claim costs.

For example, for that particular issue, a change in joint and several liability is only going to affect claims where there have been more than one defendant, so that kind of a change would not affect suits that are just brought against a single defendant. So it would be a more beneficial change but it would not affect all categories of cases.

Another example would be the state of the art defense, some sort of a change to assure that products that were considered safe at the time that they were made are not in hindsight thought to be unsafe because standards have changed over time. That is a change that we also believe would be beneficial.

With regard to the collateral source rule, there is a limited provision in the bill. I believe it only has to do with certain workplace injuries, and a more extensive opportunity to modify the collateral source rule would have a more beneficial effect as would perhaps more done in the way of punitive damages, although not necessarily going so far as the discussion when in terms of outlawing punitive damages.

These would have a greater effect on claim costs, but it would not represent any sort of an automatic or a specified beneficial effect on liability insurance rates.

Senator **Bryan**. Ms. Ballen, with greatest respect to your testimony and some of the specifics you cite, is it not pretty hard to carry the burden of proof when you say these things are likely to have greater impact and then say but I certainly would not want to make any assurance that premium costs would go down?

It always struck me that those who advocated a piece of legislation and who indicated that it would have, to use your words, beneficial results—I guess the question is benefit to whom—has at least the burden of showing that there will in fact be some reduction in cost.

My concern here is that there are a lot of people who have provided some pretty compelling evidence today that the cost of liability insurance is a factor on which they teeter in terms of whether they can continue in business. That is a concern.

I know none of the people who have testified here personally, but I think the gentleman who came from Cleveland who spoke, I thought, with conviction and passion and eloquence, has the expectation that if this bill is passed his insurance premiums are going to go down. Yet you are saying—and I do not want to do violence to your testimony—that you could not really give him that kind of assurance.

Ms. **Ballen**. I did not give him that kind of assurance.

I think one of the factors that you have to consider is not necessarily even whether insurance prices will go down but whether they will go down relative to where they might have been in the absence of the legislation.

There are a lot of inflationary factors that tend to push claim costs up. Wages go up, so every time you need to compensate an individual for lost wages, that rises. As I said before, medical costs go up. Other elements of the tort law will change and perhaps change in a way that is more pro-plaintiff.

So even the most beneficial tort law changes and even if those tort law changes do have a positive effect on those aspects of claims does not necessarily translate into any kind of a dollar-for-dollar effect on insurance prices.

Senator **Bryan**. I thank you very much for your testimony.

Let me defer now to Senator Rockefeller.

Senator **Rockefeller**. Mr. Chairman I thank you. If I could just ask the chairman this question. I had a conversation, both with the chairman of the subcommittee and the Chairman of the full committee, a month or a month and a half ago, in which I indicated, or in which it was indicated to me, that we would have a series of hearings, perhaps two, perhaps three, and that it would be the hope that we would be able to go to markup by April, and that is, perhaps, now pushing it.

I just want to make the point that if we do have another hearing, and I suspect we will have another hearing——

Senator **Bryan**. It is scheduled Senator Rockefeller for May 10, and that is the last hearing. That will conclude, and it is my hope that we will be able to get it in the full Chairman's markup. As you know, the protocol in the Committee is sometime later in the month.

Senator **Rockefeller**. Well I am very pleased to hear that because it would be my view that if we go to June, if we go to June for a markup, it is like going to August for a markup, or September. It is done, and I just wanted to make that point, and I think a markup—this committee is intensely involved on both sides of this issue, and that I would really hope that that May markup would be a possibility. And I thank the chairman.

Now if I tell the chair that I am delighted that UNLV won, will that buy me an extra minute or two for my questioning?

Senator **Bryan**. You might even get two extra minutes. Of course I thought everybody felt that way.

Senator **Rockefeller**. Let me just start with you Professor Hager if I might. You know, in my judgment, contrary to your assertion that the cost of the tort system has been exaggerated, I cite to you a recent study by Tillinghouse, Tort Cost Trends in an International Perspective page two, which documents the costs that you say are inflated. Tillinghouse found that the total U.S. tort system costs in 1987 were $117 billion, and this is consistent with the $300 billion of costs figured that would include indirect costs.

I also cite well documented studies, product liability verdicts, and case resolutions in five states. I apologize to the clerk for my fast talk, by the General Accounting Office, and the cost and compensation paid in tort litigation, by the Institute of Civil Justice, which established that over 60 percent of every dollar paid out in the tort system goes for attorneys fees and transaction costs. Your are aware of these studies. Are you not?

Mr. **Hunter**. I have not seen them all, Senator. I am familiar with the Institute for Civil Justice studies, the most recent study that you cited. I have not seen——

Senator **Rockefeller**. Okay. Your testimony criticizes business surveys which report on discontinued or underdeveloped products. But does not tell us if the lost products are things that we should have, and I want to pursue that.

Should we have, and let me just run through these. Should we have a safer substitute for asbestos? Should we have more than one American manufacturer of DPT vaccine and measles vaccine? Should we have more that two American manufacturers of football helmets and at least one domestic manufacturer of hockey equipment and trampolines? Should we have an advanced electronic ignition system for light aircraft? Should we have at least one domestic supplier of anesthesia machines? Should we have a suitcase, as has been referred to, a suitcase-sized kidney dialysis machine that could be used at home? Should we have developed a particular accelerator now used in weapons systems as a method of killing insects and parasites infesting a newly harvested crop? Should we have a new chemical process for speeding decomposition of hazardous materials?

Those are just some of the products that have not been marketed because of U.S. product liability laws. Your reaction?

Mr. **Hunter**. Some of those products, Senator, may be products that we would want to have. Some of them may not be. Some of them may have been kept from the market because their dangerous factors, are indeed, too great.

We cannot generalize about that topic from anecdotal products. It is possible that some those products should be—are beneficial enough that we should have them. But we need to look—we need to keep in mind also, the litany of unsafe products, which we might run through, which have been kept from the market by our tort liability system. It is probably the case that any tort liability system, that keeps unsafe products from the market, may occasionally keep beneficial products from the market also. But there is no—there is nothing in S. 1400 that would guarantee that the products that you mentioned, or other products in a similar category, would be the ones that would be brought back on the market.

It might well be, in fact, it certainly will be the case, that unsafe products will also be brought back on the market. We need to think about the averages when we look at that problem, and as a matter of—to some extent, first principles reasoning, there is some reason to think that the more expansive a liability is, the greater the balance of the screening out shifts onto unsafe products, and away from unsafe products, because the unsafe products are the ones that are most likely to encounter damage payments.

Senator **Rockefeller**. Mr. Huber would you care to respond to that?

Mr. **Huber**. Well, I am reminded of the economist's view that they either do or do not observe what happens in the real world, and then go off to study whether it's possible, in theory. I really do stop at the real world.

The areas that I have been most effectively and most ambitiously targeted by the liability system in recent years, and they are no mystery to anybody—contraceptives, vaccines, light planes, parts of the chemical industry. Incidentally, some of our few remaining export and competitiveness giants—a good number of them figure in this. But where the targets have been most effectively pursued are where the liability system has been most ambitious and most effective.

I will tell you what the results are: number one, if you compare our products with the rest of the world, we are not safer, and some, we are demonstratively less safe. You need not take my word for it. Take the word of the leading designers and manufacturers of contraceptives, of great scientists like Carl Gerasi. Nobel quality people, who will say that to you. So we do not see a safety edge in this country in this area. What we do see, where the liability system has been most aggressive, and particularly where it has been most random, we see clear regression. We see a loss of competitiveness, a loss of competing options, a loss of new products, as people hunker down, write larger and larger warnings, pull back, eliminate their research.

We have lost 90 percent of our research and development contraceptives. We have lost 10 out our 11 major vaccine manufacturers. You want to talk some pure theory. I think competition—I think having multiple players in industries is what gives you progress. You lose that, you fold into monopoly or worse, no supply at all, you will not get innovation and you will not get a greater safety. I think that is the real world experience, not withstanding the theories of the law professors.

Senator ROCKEFELLER. Thank you sir. Professor Hunter, litigation costs. You say that they have been exaggerated by the backers, et cetera. Is it not, I mean, just in the real world, would it not be beneficial in fact, to plaintiffs, in fact, as well as defendants, to decrease the litigation costs and time?

Mr. HUNTER. Senator Rockefeller, I am not here on behalf of the American trial lawyers. I do not personally question the proposition that the proportion of tort liability costs that fund lawyers and transactions costs is a scandal, if there is a way to have a different sort of system.

I think inconsistency with what Senator Kasten said in passing earlier in the hearing, as some sort of national compensation system, which cuts out lawyers fees and transactions costs is the way to go.

Nothing about S. 1400, with the exception of the alternative dispute resolution provisions, which I find interesting, and perhaps promising, address the proportion of the costs that go to lawyers and transactions costs.

Senator ROCKEFELLER. I thank you. Mr. Hunter, we are almost always on the same side.

Mr. HUNTER. Yes.

Senator ROCKEFELLER. On page one of your statement, you say when manufacturers complain about their lack of competitiveness, they are complaining about the cost of insurance. I agree to one of your statements when you say that manufacturers complained about their lack of competitiveness, they are complaining about the cost insurance.

While I agree that insurance is a factor that contributes to competitiveness, are you saying that the quality of the product, the innovativeness of the product, and the usefulness of the product do not affect competitiveness?

Mr. **Hunter**. I think all those affect the competitiveness, but the bottom line is whether you are going to be innovative and do those things, is how much is my insurance going to cost, or how much am I going to have to put in my self insurance fund to protect against the law suits? And if you do not change that, you, in my estimation, you do not get the other things.

Senator **Rockefeller**. But you recognize that the others are important?

Mr. **Hunter**. Yes, but without the insurance component you do not get the others. That is why the insurance is the linchpin to this thing.

Senator **Rockefeller**. American business has traditionally turned—insured against product liability costs. In Europe, business only started this insurance thing started in the late 1960's, as I understand it. Consequently, U.S. business has incurred consistently higher insurance costs than their foreign counterparts over the years.

You already agreed that insurance costs affects international competitiveness. Would you not agree that, because American liability insurance costs are higher than comparably European costs, this added cost burden on American goods makes it difficult for American business to compete in the same terms as European businesses?

Mr. **Hunter**. Yes, that is why I am for repealing the antitrust exemptions, making insurers competitive too in this country, and getting our prices down to a more competitive insurance price. I would be glad if you would support that Mr. Rockefeller.

Senator **Rockefeller**. Mr. Hunter, you are an actuary?

Mr. **Hunter**. Yes.

Senator **Rockefeller**. Let me ask you this. Suppose that you were presented with this situation: A state has a tort rule in which there is a restriction on joint and several liability, similar to the provisions of S. 1400, under which joint and several liability is not permitted for pain and suffering damages. Then a law is enacted in that state permitting unrestricted joint and several liability against any party, regardless of the degree of their fault.

Now, if you were an actuary engaged by an insurance company to assist in the preparation of a rate filing, would you recommend an increase in premiums to account for broader rule of joint and several liability?

Mr. **Hunter**. I would look at our statistics first, but to see if there were any, and if there were some, then I would expect that an expansion would increase the cost. However, most of the studies I have seen on joint and several show very minor effects of that. And so I might allow some increasing costs or suggest an increase in cost to my client, but I think it would be extremely modest, if anything. I think that is why in the studies of Aetna, they concluded that elimination of joint and several or reduction of joint and several, had no effect, actuarially. There are actuarial studies attached to my testimony, where their actuaries said zero effect.

Senator **Rockefeller**. Again, as an actuary—excuse me Mr. Chairman, please be kind to me. Would it not be far more desireable for actuaries of insurance companies to have a clearly defined national rule of product liability that could assist them in determining the exposure of manufacturers to damages for injuries caused by defective products? Would that not be a better, more sensible, more predictable system in which to apply actuarial science, than a system in which the states are free to develop contradictory rules, which in fact, of course, they do?

Mr. HUNTER. The actuaries are used to that. The actuaries have contradictory rules in tort law, in all lines, not just products.

Senator ROCKEFELLER. I know you are used to it, but would it not be better if we had the other?

Mr. HUNTER. Well the best would be to have no tort law. That would be the most predictable and the actuaries could put in a zero factor for that. That, clearly, would imply then that the claimants who were hurt would collect nothing. So you have to balance. I assume in your chair, as opposed to an actuarial chair, you have to balance predictability with whether you pay people or not, who are hurt. I think it is possible that a uniform standard would be more predictable. I am not sure that is good for the country.

Senator ROCKEFELLER. You think it is possible?

Mr. HUNTER. Yes.

Senator ROCKEFELLER. And you are not sure it would be good for the country?

Mr. HUNTER. I am not sure that it would be good for the victims. I think unpredictabilities is what makes manufacturers improve their products. If you have absolute predictability, you know exactly how much you going to lose on every law suit, and you can predict you are going to have 200 die from your product, and that is cheaper than fixing it, and you could predict it, you will not fix it.

Senator ROCKEFELLER. Mr. Huber.

Mr. HUBER. I really do not think Mr. Hunter will, after he goes home and reflects on this, want to stand on his statement that uniformity is not good for actuaries. The larger your database, without doubt, I mean, there is no question on this. A simple statistical truth. If you have larger numbers to work with, and more uniform rules, your job as an actuary is easier. I think it is completely false dichotomy.

Mr. HUNTER. When did you pass your actuarial examination?

Mr. HUBER. Would you like to contradict that statement?

Mr. HUNTER. Yes.

Mr. HUBER. A larger database.

Senator BRYAN. Gentlemen, we can conduct this colloquy after we adjourn. Let's respond to the Senator's question, and I think we will wind this up.

Mr. HUBER. Mr. Hunter, of course, has some experience predicting numbers as I understand. That they worked on the Swine Flu program and Congress might wish to examine it's prediction that it made in 1976.

Senator BRYAN. Mr. Huber, if we could get you to confine your comments to Senator Rockefeller's question.

Mr. HUBER. I am sorry, Senator. You will have to remind me of exactly which issue you wish me to address.

Senator ROCKEFELLER. The question of uniformity, whether it means predictability and the predictability ought to mean something to an actuary.

Mr. **Huber**. It means a great deal to an actuary. It is absolutely no question whatsoever, that larger databases make for more solid statistics. And with more solid statistics, it is easier to write insurance. There is absolutely no doubt whatsoever about that.

Senator **Rockefeller**. Mr. Chairman, I thank you for you indulgence.

Senator **Bryan**. Thank you very much, Senator Rockefeller.

I would remind each member of this panel that Senators may have some questions. We would like to ask you to respond. The hearing record will be kept open until everybody has had a chance to respond to those questions, but we ask you to do so promptly. The subcommittee hearing will stand in recess.

[Whereupon, the hearing was adjourned at 1:05 p.m.]

PRODUCT LIABILITY REFORM ACT

THURSDAY, MAY 10, 1990

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on the Consumer,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room SR-253, Russell Senate Office Building, Hon. Richard Bryan (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR BRYAN

Senator **Bryan**. Good morning, ladies and gentlemen. This is the third and final hearing in the subcommittee's hearings on S. 1400, the Product Liability Reform Act. The subcommittee's goal throughout the process has been to explore this complex and highly controversial issue in a thorough and balanced manner. I believe that we are close to achieving that goal.

During the course of these hearings it has been evident that the protagonists have very strong views and that this has been a rather longstanding drama as it unfolds. The subcommittee has attempted to hear from all points of view and to explore the major issues presented by this legislative proposal. We have heard testimony about the current state of the product liability system, its effect upon the competitiveness of American business and the relationship of insurance to this issue.

This morning we will consider the specific legal doctrines that are embodied in S. 1400 to learn about how these doctrines work and what changes this bill, if it is enacted, would make. Once that examination is completed, I am hopeful that all parties involved would agree on at least one thing, that they received a fair hearing which explore the significant issues presented by this legislation, and I look forward to hearing the testimony of the witnesses this morning.

I might say for those of you who have raised the question with me and other members of the subcommittee as to when this matter will come before the full committee for mark-up, Chairman Hollings has authorized me to indicate to you that this bill will be considered at the next mark-up of the full committee. So, we have that assurance from the Chairman, and we will proceed according to his schedule.

I will at this point yield to Senator Rockefeller for any opening statement that he cares to make.

OPENING STATEMENT BY SENATOR ROCKEFELLER

Senator **Rockefeller**. Thank you, Mr. Chairman. Just one minor clarification on the next mark-up. Will the next mark-up be this month? As I think the Chairman of the full committee indicated, that there would be a mark-up before Memorial Day? Is that your understanding also?

Senator **Bryan**. I have no understanding in terms of the specificness of the date. I would just simply indicate that the Chairman, obviously, sets the mark-up date, Senator Rockefeller, and it is my understanding that whenever that next mark-up is that this will be on the agenda. As you know, he is the one that sets those matters.

Senator **Rockefeller**. I understand that, and I have talked with him, and he had indicated to me that there would be a mark-up prior to Memorial Day, and I was hoping that there had not been any changes in those plans, and wanted to know if you had had any communications with him that indicated otherwise or——

Senator **Bryan**. My understanding is consistent with your own is that there will be a mark-up later at the end of this month.

Senator **Rockefeller**. The reason I just mentioned that is that I think that is the only way that this bill will have a chance of passing or being considered by the full Senate. I mean if we have one in June or July, the bill is history. May is important, and so I am very appreciative of that clarification. I will be brief, Mr. Chairman.

When we started to delve into this issue back in February, I was already a co-sponsor of S. 1400. I frankly have been strengthened in my convictions that we have had during witnesses during these interim two hearings that strengthen my own convictions about the need for the bill. The transaction costs, the costs of litigation, the court costs, attorneys' fees, the immensity of same. Plaintiff and defense lawyers collect almost as much from the system as injured victims do—in some cases more—and most of the money paid out by manufacturers never reaches the victims' pockets at all, and I am trying to think how is that in the interests of consumers. How does that help victims.

There is a mammoth backlog of court cases that compounds these financial problems. People have to wait so long. Plaintiffs are forced to wait for years to be compensated because litigation does not have an incentive system to go ahead. It drags on, and plaintiffs are not the only victims of current law. The private sector also suffers from the lack of uniform product liability legislation. That is the point of what we are doing here: the unpredictability of our product liability system whereby products are subject to these various 50 state laws.

I recall the Chief Justice of the Supreme Court of Maine, who came here to testify against the bill, indicated that he also agreed that if we had a uniform Federal liability law, one Federal law, 50 states trying to make interpretations of one Federal liability law is better than 50 states trying to make interpretations of 50 other states' liability laws where we are dealing so much in interstate commerce. And he agreed with that point, which I think is fundamental to the case for S. 1400.

I have indicated before, I think, innovation and risk taking creativity is essential to the American system. We have not distinguished ourselves in the past decade or so in our competitive position in this country. What is happening in Asia, what is happening in Europe I think bodes even more stringently for our competitive position in the future. People say well, you are talking about competitive position. That is some kind of a fillip.

I think it is not a fillip at all. I think the competitive position of this country has to do with who works and who does not work, and it is fundamental to the future health of lawyers and victims and companies and everybody. I mean, if we are not competitive, we have nothing to look forward to, and I think it is a fundamental factor in my motivation for wanting to see this legislation go through. And, therefore, I think we have got to do better than the status quo.

Witness after witness at these hearings has confirmed the potential benefits of a more uniform product liability system, one which gets a larger share of transactions costs into the pockets of the people who were injured, and that is what we are trying to do, those of us who favor the bill, and one which is more predictable and less expensive to American business. The bill may not be perfect—I do not contend that it is—but it is a fair and it is a measured way of addressing these problems, and I look forward to seeing it pass out of this committee. And I thank the Chair.

Senator **Bryan**. Thank you very much, Senator Rockefeller. And I would defer next to the full committee ranking member, Senator Danforth.

Senator **Danforth**. I have no comment at this time.

Senator **Bryan**. Thank you. Senator Kasten, the prime sponsor.

OPENING STATEMENT BY SENATOR KASTEN

Senator **Kasten**. Mr. Chairman, first of all let me say I am pleased that we are going to conclude today the third and final hearing on S. 1400, the Product Liability Reform Act. We have now got 29 Senators who are co-sponsors of the bill—importantly from both sides of the aisle—and I believe we now are ready for this bill to move to the full committee for mark-up before the Memorial Day recess, and I appreciate the comments that both you and Senator Rockefeller have made.

I also might say, Mr. Chairman, I appreciate the balanced way, almost balanced panel by panel, let alone hearing by hearing, with which you and your staff have approached this issue. I think it has been helpful. I think it has been educational. But I think it is showing the best of the legislative committee process, and I just want to commend you for that.

The conclusion of these hearings are a major step, I believe, toward the enactment of reasonable product liability reform. Americans across this country can take heart that this long-fought battle is, I believe, nearing an end. This initiative protects the rights of consumers while also assuring them of a continued supply of state-of-the-art products which enhance our standard of living.

Our hearings have given us an overview of the sorry state of our patchwork system of product liability law and its burdensome effect on American competitiveness. The system provides a disincentive for the development of new and better products while forcing the consumer to pay higher costs. Only the lawyers from both sides gain total transaction costs eating up 67 cents or more of each dollar expended in the system. We had testimony from attorneys in the hearing before last that that now goes up to as much as 75 cents of each dollar going for attorneys for transaction costs.

I look forward to our testimony here today. The bill we have before us is more narrowly focused than previous bills. We did not deal with state law standards of liability, nor does the bill take away any causes of actions that injured parties now have, and I am particularly pleased to see Ms. Lipsen and Professor Henderson together today on our first panel. In fact, Ms. Lipsen several months ago referred me to some of Mr. Henderson's work I am sorry that the organizations that she represents have not yet seen fit to support this fair and reasonable compromise bill.

We also will hear testimony from our other witnesses on the FDA punitive damages provisions, the joint and several liability reform provision, and the workers' comp. provision. In all instances I believe that the bill strikes the balance of fairness between the various competing interests.

I look forward, Mr. Chairman, to this bill being passed out of our committee, receiving perhaps a 30-day, hopefully less, referral to Judiciary if requested, and then action on this bill on the floor of the Senate. I am optimistic as to the Senate passage of this measure this session. I am not blind to the road which lies ahead, but I believe that we are reaching a strong consensus of bipartisan consensus in support of meaningful product liability reform.

Senator ROCKEFELLER. Mr. Chairman, could I ask Senator Kasten one question——

Senator BRYAN. You may.

Senator ROCKEFELLER. Which is to his and my mutual benefit. Is there any doubt in your mind, as there is none in my mind, that if this bill were to reach the floor of the Senate that it would pass and that it would pass easily?

Senator KASTEN. I believe that the only questions that we're faced with and dealing with are procedural questions. I believe that we have the votes to, based upon my count, to pass the bill. We also have the votes to invoke cloture. We have the votes to, in effect, work the process. Whether or not the body will have the bill to go through what will be a procedural effort made by some opponents is the only question in my mind. With 29 co-sponsors I believe there are enough of us to move the bill through even a difficult procedural situation because I think that in the end the votes are maybe 77 or 78 in favor of our legislation on final passage.

Senator BRYAN. Thank you very much, Senator Kasten and Senator Rockefeller. We will begin this morning by hearing from our first panel of distinguished witnesses. We welcome once again to the panel Professor James A. Henderson, Jr., the Frank B. Ingersoll Professor of Law at Cornell Law School, Ms. Linda Lipsen, Legislative Counsel, Consumers Union. Ms. Lipsen, it is nice to have you with us this morning. Mr. Richard Kingham, Covington & Burling, on behalf of the Pharmaceutical Manufacturers Association, and Dr. Sidney M. Wolfe, Director of Public Citizen Health

Research Group. And I may have neglected in introducing Ms. Lipsen to indicate that she is a legislative counsel for the Consumers Union. I apologize for neglecting to point that out.

Welcome to the panel, and as soon as you are comfortably seated, we will hear first from Professor Henderson. Good morning, sir.

STATEMENT OF JAMES A. HENDERSON, JR., FRANK B. INGERSOLL PROFESSOR OF LAW, CORNELL LAW SCHOOL

Mr. **Henderson**. Thank you, Senator. I would like to remind you that Professor Aaron Twerski and I made a written statement that I would like to be made a part of the record.

Senator **Bryan**. That will be the order.

Mr. **Henderson**. Thank you. I understand from her written statement that Ms. Lipsen, who follows me on this panel, insists that S. 1400 is anti-consumer. I take a very different view. It has long been my view that a lot of existing American products liability law is, on any fair account, anti-consumer. To the extent that S. 1400 would change some of what is wrong, it is a pro-consumer proposal.

Ms. Lipsen's argument consists of two parts. First, she equates consumers with tort plaintiffs. For her, the two terms are synonymous. Second, she characterizes the bill's provisions as invariably and relentlessly cutting back on plaintiffs' opportunities to recover in tort. By definition, then, a bill that does nothing but reduce tort plaintiffs' opportunities to recover damages is anti-plaintiff, and since plaintiffs are synonymous with consumers, an anti-plaintiff bill is an anti-consumer bill.

Both parts of this syllogism are dead wrong. The bill does much more than reduce tort plaintiffs' opportunities to recover, and even when it does reduce those opportunities, it does so in a pro—consumer way. Let us consider more carefully the idea that any measure that reduces tort plaintiffs' opportunities is, per se, anti-consumer, without regard to the underlying merits of the reduction.

Consider the implications of such a position. Does anyone really believe that it is always in the interests of American consumers to enhance at every opportunity plaintiffs' chances for recovery? Intuitively, one senses that the answer must be no. The imposition of liability in any context either helps or hurts American consumers as a group, depending on the basis of the imposition.

Even if it is by definition true that imposing liability always helps the plaintiff in the particular case, the key to understanding is realizing that the categories of plaintiffs and consumers are not identical or synonymous. Think of it this way: products liability affects consumers not just as victim-plaintiffs after the fact of injury—Ms. Lipsen's view—but also as product purchasers and users in the vast majority of instances in which no injury occurs. It is consumers who must pay for the liability that helps injured plaintiffs' through higher prices and decreased availability of products.

Now, to some extent we want consumers to pay this tax, but it depends on whether liability is fair and just. If liability in a particular context is not fair and just, then taxing most consumers generally to let a few of them receive a windfall is, on balance, anti-consumer.

Three provisions of S. 1400 cut back on what I believe are examples of unfair and unjust liability under the law of many States. Section 303 would curtail unfair and unjustified examples of courts awarding punitive damages. Section 306 eliminates joint and several liability where it works injustice, and Section 307 recognizes defenses in cases involving alcohol and drug-related accidents.

Let me quickly look at the last example. Who benefits when plaintiffs guilty of substance abuse recover, notwithstanding that their abuse caused their injuries? The lawyers and their clients who do not deserve to benefit. Who pays? The majority of consumers who do not engage in that sort of abuse. My conclusion: Section 307 is pro-consumer, not anti-consumer, even if it denies some ill-deserving plaintiffs recovery, and I think the same thing could be said for the punitives and joint and several provisions in the bill.

You will recall the second part of the anti-consumer argument is that the bill hurts plaintiffs right down the line. Now, I would like quickly to point out that much of the bill is not even guilty of hurting plaintiffs' opportunities, let alone consumers' interest. I count eight substantive provisions in the bill. Four of them—one half of them—are neutral toward plaintiffs.

Quickly, Sections 201 and 202 offering expedited settlements and alternative dispute resolution are open to both sides. Section 302 curtails nonmanufacturer-seller's liability only if it does not prejudice plaintiffs. Section 305 recognizes Worker Comp benefit offsets, but plaintiffs will recover everything under the bill that they recover presently. The bill reallocates part of the liability, appropriately, I think, to employers guilty of fault as between manufacturers and employers.

Look a moment more carefully at 302, curtailing resaler and wholesaler liability when it does not prejudice plaintiffs. Who benefits when retailers and wholesalers have to hire lawyers to attend trials where they are not really needed? You know who—the lawyers. Who gets taxed to pay those lawyers? You know who—consumers generally.

So in closing, I would like to say S. 1400 is not anti-consumer, it is pro-consumer when you bear in mind who gets taxed to pay the judgments. Indeed, I will point out that 304(a), dealing with time limits, would actually improve plaintiff's chances in some states. If S. 1400 is anti-anything, it is anti-trial lawyers, who clearly benefit, as consumers do not, from excessive liability.

This much is clear. Who will benefit if S. 1400 is defeated? Trial lawyers and their clients who will, in the cases S. 1400 would affect, continue to recover under unfair and unjust State law. Who will keep paying these unfair and unjust liability costs? You guessed it—the American consumer.

Thank you.

[The statement follows:]

JOINT STATEMENT OF

PROFESSOR JAMES A. HENDERSON, JR.
CORNELL LAW SCHOOL

AND

PROFESSOR AARON D. TWERSKI
BROOKLYN LAW SCHOOL

We are both law professors who have taught and written in the fields of torts and products liability for more than twenty years. We have also testified over the years before various committees of the Congress, as well as before state legislatures, regarding various products liability issues and proposed legislation. Throughout this time period, we have been advocates of product liability reform. In appearing in support of the latest proposal for federal reform, S 1400, we wish to thank the Consumer Subcommittee for inviting us to submit this written testimony. In submitting it to you we should make clear that we do so on behalf of the Product Liability Coordinating Committee and the industries represented by that group.

Recently Professor Henderson has been collecting data about products liability court decisions and, in a study published in February of this year, perceives a trend in recent cases. This trend shows that the rampant pace at which American courts were expanding products liability law has slowed markedly. We both concur that this trend moves court-made products liability law away from extreme and unwise doctrine under which even reasonable manufacturers are held liable. However, to conclude that this trend will resolve all of the serious inequities and legal conundrums that still exist would be a misuse of the data collected in the study. A more accurate statement would be that the data reveal attempts by an increasing number of courts at self-correction. As we shall explain in our comments that follow, we believe that the problems that have developed due to the rapid expansion of product liability laws over the past twenty years cannot be adequately addressed by "self-correction." The better, more efficient way to address some of the profound problems products liability law has caused our legal system and society is through thoughtful, sparing and modest legislation at the federal level. We believe S. 1400 is a worthwhile attempt at some of the needed reforms.

Before proceeding with a section-by-section analysis and justification of S. 1400, some general observations will be useful. We support the proposal and urge its enactment into law. As we have observed many times in previous statements on the record, the products liability law in many American jurisdictions is in need of repair. Some of the needed changes can be expected to come from judicial decisions. As we have observed, there are some encouraging signs in recent years that courts may increasingly be willing to do their parts in this regard. But we believe that legislatures have a significant role to play in repairing products liability law. Indeed, a number of state legislatures have enacted important reforms in recent years. As we shall make clear, however, some areas of concern present problems that only the Congress is uniquely situated to solve. Essentially, these are problems where achieving nationwide uniformity is especially important. In our judgment, S. 1400 identifies those areas and addresses those problems.

For the Congress to change products liability law, which has traditionally been left to the several states, the problems must be serious. We believe those addressed in S. 1400 exceed the threshold requirement to justify federal intervention. The problems must also be such as to require remedies that the Congress may invoke clearly and cleanly, without necessitating a lengthy and costly period of judicial interpretation of exactly what the federal statute means to do. We believe that S. 1400 also meets this need for clarity and simplicity. In choosing to focus only on those areas that lend themselves to relatively nonproblematic implementation, S. 1400 reflects considerable restraint on the part of its drafters.

In sum, we believe that notwithstanding some encouraging signs of shifts in judicial attitudes toward products liability, problem areas remain that require legislated reform; that while state legislatures are competent to address, and indeed are addressing, certain of these areas, others remain that require Congressional action; that federal products reform must be careful to effect change clearly and cleanly so as to minimize the costs of achieving uniform patterns of judicial decision nationwide; and, finally, that S. 1400 meets these criteria we have identified.

Section-By-Section Analysis

1. Preemption of State Law. Some have called the enactment of a federal law concerning product liability an unjustified or unwise invasion of state sovereignty. Yet, Congress has used its power under the Commerce Clause many times, admittedly with reluctance, to address national problems that threatened to undermine some of the basic tenets of our society. U.S. products liability laws, as developed over the last two decades, have compromised numerous settled values of fairness and have impinged on some very basic freedoms related to commerce and competition, as discussed in prior Committee hearings and a growing body of literature. In light of the effect these laws are having on the nation as a whole -- and the unpredictable, irregular ways in which state common law evolves -- it would be unwise for Congress to fail to consider some type of federal preemption of state products liability laws.

S. 1400 is not a wholesale preemption of state tort or product liability law, as were previous federal product liability reform measures considered by earlier Congresses. We supported some of the earlier reform measures, their relatively grander scale notwithstanding, because at that time we saw the rampant erosion of traditional legal rules by the equally uncontrolled evolution of products liability laws. Now, consistent with recent trends we perceive in products liability law[1], we believe a more modest approach to the problem is in order.

First, S. 1400 does not affect tort law generally -- it is limited to civil actions involving harm or loss caused by a product. It does not change state law standards of care applicable to manufacturers, nor does it deprive injured victims of any causes of action. As explained earlier, S. 1400 addresses a limited number of products liability law issues in which nationwide uniformity is especially necessary and in which the Congress can effectively achieve uniformity. To achieve this objective, the substantive provisions of the bill must replace state law. However, given the limited number of areas addressed by S. 1400, the largest part of state products liability law will remain intact and unaffected.

Moreover, S. 1400 expressly preserves the sovereign immunity of both the states and the federal government. It does not affect the jurisdiction of state or federal courts regarding products liability actions, nor does it affect the role state courts traditionally play in the development of the substantive aspects of tort law. Consequently, the only preemptive effect S. 1400 will have on state laws and state courts involves matters that do not go to the heart of tort or products liability law. As such, the legislation is narrowly tailored to address some of the more burdensome effects that fifty-plus different state laws have had on interstate commerce.

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[1] See, e.g., Henderson & Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479 (1990); Hearings on S. 1400, Effectiveness of the Current Product Liability System and the Potential Effect of Federal Preemption, Before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, 101st Cong., 2d Sess. (Feb. 22, 1990) (Testimony and Statement of Profs. James A. Henderson, Jr. & Theodore Eisenberg).

2. Jurisdiction. As we mentioned above, Section 104 of S. 1400 preserves, without expanding upon, the existing jurisdiction of federal courts. Thus, federal courts will still have the authority to hear product liability cases based on diversity of citizenship, in which cases they must still apply substantive state law except for the few standards established in S. 1400. No federal court may assume jurisdiction over a product liability action based solely on a provision of this legislation. Given the limited preemptive effect of the law along with the "freezing" of existing law governing jurisdiction, this bill will have very little, if any, effect on the distribution of litigation among the state and federal court systems.

One further issue relating to jurisdiction remains to be considered. Because the bill does not give federal courts an independent basis of jurisdiction, some critics have argued that different state courts will interpret the language differently, leading to lengthy and costly efforts to achieve uniform patterns of interpretation. The earlier, more expansive federal reform proposals may have fallen prey to such a prediction. But S. 1400 is modest enough to achieve its changes clearly and cleanly. Any interim period of accommodation of its provisions to the rigors of adjudication should generate only modest costs well worth incurring.

3. Expedited Settlements and Alternative Dispute Resolution. One of the problems we have observed with the current products liability system is the high cost to both sides of using the system. Back in 1983, Professor Henderson testified in support of

S. 44, pointing out that less than 50 cents of every dollar spent by both plaintiffs and defendants in products liability actions goes to the injured party after all is said and done. This is an outrageously high level of transaction costs for the parties and society to pay. A recent study by the Tillinghast Group shows that the cost of compensating victims under our tort system is higher than the cost of any other "social insurance" system throughout the entire world.

To help eliminate some of these extreme costs, S. 1400 provides incentives for litigants to use two alternatives to the trial process. One is an expedited settlement procedure with financial incentives and the other is an alternative dispute resolution procedure, also with financial incentives. It should be noted and emphasized that the bill offers these alternative processes symmetrically to defendants and plaintiffs. Either side in a products liability action may take advantage of the provisions in this regard.

Section 201 of the bill sets forth the expedited settlement procedures. It firmly pushes the parties to settle when a reasonable offer is made by placing a financial penalty on the party who, for whatever reason, refuses to properly evaluate the strengths and weaknesses of his position. If either party makes a reasonable offer to settle -- the plaintiff in the initial complaint or the defendant within the time period allowed for responsive pleading -- and the opposing party refuses to accept that offer, the opposing party must pay the offeree's reasonable attorneys' fees if the final amount payable under the verdict after trial is less advantageous to the opposing party than the amount offered in settlement.

Section 202 permits either party to offer to resolve the dispute under any voluntary alternative dispute resolution (ADR) procedures recognized under state law, provided the offer is made at the time of filing for the plaintiff or before the time the responsive pleading is due for the defendant. Like the expedited settlement provision, if a refusal is unreasonable or not in good faith, the court can require the refusing party to pay the reasonable attorney's fees of the party that offered to use ADR.

Both of these provisions are aimed at reducing some of the very high transaction costs that arise in the traditional trial process, which is a very important objective for any federal reform legislation. Further, these provisions will have a secondary benefit -- diverting traffic from already overburdened courts toward other, equally fair and effective means for resolving claims.

4. Uniform Standards of Product Seller Liability. Sections 102(14) and 302 of S. 1400 contain provisions that will limit the situations in which a product seller other than a manufacturer can be held liable for a defective product. Clearly, in almost all cases the nonmanufacturing seller has nothing to do with the quality of the work that goes into manufacturing a product and is also powerless over design decisions. Further, the seller generally has no way of knowing whether a particular product is safe or defective, especially when the product is distributed in factory-sealed packages.

This provision is consistent with laws recently enacted in several jurisdictions, which eliminate strict liability for wholesalers and retailers where they had no opportunity to inspect the product because of factory packaging. It is also similar to a product seller defense contained in the New York State product liability bill last year. We testified in support of that provision in New York, and urge this Committee to support the similar provision contained in S. 1400 for essentially the same reason -- it is basically unfair to drag innocent wholesalers and retailers into costly product liability actions when the only role they played was as a conduit for getting the product from the manufacturer to the ultimate product user.

Section 302 does, however, preserve product seller liability in four situations: 1. when the seller has been negligent in its handling of the product, and that negligence causes the plaintiff's harm; 2. when the seller failed to provide reasonable warnings or instructions on product use provided by the manufacturer; 3. when the seller breached express warranties made by the seller about the product; or 4. when the actual manufacturer of the product is not effectively subject to the court's judgment, such as when the manufacturer is not subject to service of process or when the manufacturer in unable to pay a judgment.

In the first three instances, the seller arguably may have contributed to causing the plaintiff's harm and, as such, the seller may no longer be an innocent middleman. Thus, exposing the seller to potential liability does not raise issues of fairness. In the last instance, exposing the seller to liability when the manufacturer cannot be held liable, the bill reflects a fundamental balancing of the needs of two innocent parties -- the product seller and the victim. The bill comes down in favor of compensating the injured victim, even though the seller who will ultimately pay the compensation did not contribute to the victim's injury through any breach of responsibility.

5. Uniform Standards for Punitive Damages. One of the most heated debates that the current product liability system generates involves the standards, or lack thereof as some might say, that judges and juries use to impose punitive damages on defendants. Most recently, this debate has focused on the constitutionality of these standards; the Supreme Court granted certiorari last month in a case raising these issues, Pacific Mutual Life Insurance Co. v. Haslip.[2]

Punitive damages can impose destructive and often crushing liability on a corporate defendant. Repetitive punitive damages judgments in product liability cases have the potential to literally bankrupt defendants. Thus, since January 1986, twenty-five states have passed statutory provisions limiting the scope of punitive damages. Section 303 addresses these issues, as well as others, and contains reasonable and effective ways of eliminating some of the concerns.[3]

First, Section 303(a) creates one standard for judges and juries throughout the nation to use when considering whether to award punitive damages:

> "Punitive damages may, . . . be awarded . . . to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by the product."

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[2] 553 So.2d 537 (Ala. 1989), cert. granted, 110 S. Ct. 1780 (U.S. Apr. 2, 1990) (No. 98-1279).

[3] We are both on record as supporting federal legislation governing punitive damages. See Henderson and Twerski, Products Liability: Problems and Process 297-300 (1987).

This relatively mild statement contains enormous power because it ensures that conduct that rises to the level of warranting a damage award of crippling potential in a Maine court will be judged by the same standard in a court in Oregon. It makes eminent good sense as national policy to define a threshold of conduct beyond which no manufacturer may pass without exposing the business to the potential of financial ruin through punitive damages.

Further, the "clear and convincing" burden recognizes the extraordinary nature of punitive damages by elevating the level of certainty that must exist before a jury may award punitive damages. At the same time, the burden is not so high that it could almost never be met, as might be the case if the burden were "beyond a reasonable doubt." Finally, Section 303(a) and (b) provide that punitive damages shall be unavailable when the jury awards no compensatory damages, unless the victim's harm was death and the applicable state law permits the award of punitive damages only.

Second, Sections 303(c)(1) and (2) address an anomalous characteristic of our product liability system whereby distribution of products that can only be marketed if made and approved in accordance with federal regulations, such as drugs, medical devices, and aircraft, can nonetheless be the cause for finding the manufacturer's conduct outrageous in marketing the products. Assessing punitive damages in this situation serves no legitimate social purpose and, in fact, undermines the integrity of the governmental regulatory process. Sections 303(c)(1) and (2), therefore, would make punitive damages unavailable in product liability actions where a drug or medical device was approved by the Food and Drug Administration; and in the case of aircraft, certified by the Federal Aviation Administration. However, if the defendant obtained government approval or certification by withholding or misrepresenting information to the government in order to obtain approval, then punitive damages would still be available in these cases. These provisions are very similar to provisions included in the New York product liability bill we supported last year.

Finally, Section 303(d) would permit a defendant to request a separate trial for determining whether punitive damages will be awarded and, if so, their amount. Further, it would preclude, at the trial regarding compensatory damages, evidence relevant only to the punitive damages. This would eliminate much confusion in the minds of jurors, who often find it impossible to exclude evidence admitted only for a limited purpose from their deliberations regarding all other issues. We have often questioned the ability of jurors to segregate the information they hear at trial into the neat mental boxes lawyers can sometimes imagine when focusing on narrow issues of law. By separating the trial on punitive damages in time from the trial of other issues, it increases the likelihood that jurors will be able to follow the trial court's instructions on the use of evidence and should lead to increased confidence in the jurors' verdict.

6. Uniform Time Limitations. Section 304 establishes two national limits on the time period in which a plaintiff must file a product liability action against the manufacturer. First, a plaintiff will have no less than two years from the time an

injury or harm, and its cause are discovered, or should have been discovered, in which to file a products liability action against the manufacturer. Second, products liability actions regarding a specific category of products will be barred after twenty-five years from the date a manufacturer delivers a product to its first purchaser (other than another manufacturer or product seller).

The two year time limit from discovery of the injury simply replaces the varying time limits that exist in all states regarding the right to sue. This provision, if enacted, will make it possible for the consuming public, for the first time ever, to protect its own legal rights regarding injuries from defective products with certainty. Some states have statutes with time limits that begin to run at the time of injury. This may be unfair to a claimant whose injury is latent and not discoverable for some time after the injury has occurred. Additionally, some claimants may be aware of an injury, but unaware of the cause for several years. To avoid unfairness to claimants, the two-year time period in this section does not begin to run until both the injury and the cause are discovered or discoverable by due diligence. By linking the running of the two-year filing deadline to the discovery of the cause of the injury, S. 1400 would establish a decidedly pro-plaintiff standard that is more advanced than most current state standards of which we are aware.

Unlike Section 304(b) of this bill, which would establish a twenty-five year statute of repose for most consumer products, the New York product liability bill which we supported, provides that suits will be barred ten years after the initial distribution of a product. Although arguably the ten-year bar in New York would give consumers ample time to bring suit, we nevertheless support a longer period of repose, such as that contained in Section 304(b). We support this provision because of the importance of setting some end-date for a manufacturer's threat of liability. As each year passes following the initial distribution of a product, it becomes more and more difficult to reconstruct the relevant events pertaining to a claim of product defectiveness. Not only facts become difficult to reconstruct as time passes, however -- the relevant social attitudes and values that surrounded original distribution often become difficult to understand and appreciate through hindsight.[4] When asked to judge a product as of the time it was originally distributed many years ago, jurors face a hopeless task without some sort of time travel device. Further, business managers cannot plan adequately for the future when there is no end to liability and liability insurers become increasingly reluctant to insure products that are intended to last for any significant period of time. Consequently, a national statute of repose would help eliminate much of the uncertainty facing today's manufacturers and insurers. A national statute of limitations would do much the same for consumers.

7. Workers' Compensation Offset. In our textbook, we give our students a recipe:

> Mix together the following ingredients: (1) a steady stream of serious and often permanently disabling injuries to employees flowing from hundreds of thousands of workplace accidents...; (2) the growing expectation among our citizenry that whenever serious injury occurs in a commercially managed environment, the managers of that environment should probably be liable in

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[4] For an extensive discussion of the unfairness created by imposing liability after significant shifts in social attitudes toward risk, see Henderson, Coping with the Time in Products Liability, 69 Calif. L. Rev. 919, 927-31 (1981) and Twerski, Rebuilding the Citadel: The Legislative Assault on the Common Law, 15 Trial 55, 57-58 (1979).

> tort to the injured persons; and (3) the three-quarters-of-a-century-old tradition under American worker compensation statutes that the compensation remedy, which is typically only a fraction in size of the potential tort remedy, is exclusive -- the employee may not being a negligence action against his employer. Stir these ingredients over a moderate flame and what have you got? . . . . Add one further ingredient: many of these workplace accidents occur in the context of the employees' using dangerous and allegedly defective machinery and equipment manufactured by corporations that are not immune from tort liability to the injured employees. Now what have you got?[5]

We conclude that we have a very volatile and troubling situation. According to one study, employer negligence is implicated in more than half of all employment-related products liability claims.[6] Yet, under the majority rule, the entirety of the loss is placed on the product manufacturer, with no right of contribution against the employer. Manufacturers are justifiably angered by this result, because the no-fault worker compensation system ends up bearing no responsibility whatsoever for the harm caused by the employers' conduct.

Section 305 would reduce the manufacturer's damages by deducting from the amount the manufacturer must pay the employee an amount equal to any amount paid to the injured employee as workers' compensation benefits. Thus, the employee still receives the total dollar amount actually awarded by the jury, while the manufacturer is not charged with making what is in essence a double payment to the employee. Further, this section would eliminate the employer's right to seek subrogation from the manufacturer for the amount paid to the worker as workman's compensation -- an amount that is essentially a windfall to the employer -- if the employer was at fault for some or all of the injury. Thus, Section 305 eliminates the loopholes in current workers' compensation laws that allow a negligent employer to escape financial responsibility for his injurious conduct.

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[5] Henderson & Twerski, Products Liability Problems and Processes 57-58 (1987).

[6] Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results Report 10, 64-66 (1977).

Not only does Section 305 correct a significant unfairness to manufacturers under the existing systems in most states, it also represents as clearly as any, an area of products liability that is certain never to be changed at the state level. Workers' compensation is a political football of such enormous proportions as to defy any hope of sensible reform at the state level, much less reform that is uniform across the 50 states. If these areas of egregious unfairness are to change for the better, Congress will have to do the changing.

8. Several Liability for Noneconomic Damages. One of the areas of product liability law that undermines our societal preference for "fair play" is joint and several liability. In our society, we normally impose responsibility or punishment only on those who are to blame or at fault. Joint and several liability turns this principle on its head to a large degree. When combined with comparative fault, joint and several liability means that if there are two defendants, both defendants are equally liable for paying the entire amount awarded, regardless of the degree of fault assigned to each. Under this provision of law, a defendant found responsible for a small percentage of fault -- five percent, for example -- could be forced to pay for 100

percent of the plaintiff's losses if the other defendant found 95 percent at fault were unable to pay the judgment.[7]

So far nine states have eliminated joint and several liability regarding some or all components of damages. A similar change is pending in New York. Thirty states have enacted legislation modifying some aspect of joint and several liability. While this demonstrates that more than a majority of state legislatures recognize the inequities of joint and several liability, it has resulted in an extremely confusing patchwork of inconsistent laws that make it difficult to accurately predict potential liability. Once again, Congressional action is necessary if uniformity is to be achieved.

Section 306 would eliminate joint and several liability only for noneconomic damages. Consequently, it does not go as far as most statutory reforms already made in the states. Noneconomic damages are those losses claimed by the plaintiff that cannot be objectively verified in dollars and cents, including pain and suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, or injury to reputation and humiliation.

While the concept of joint and several liability may offend our sense of fairness generally, it is particularly onerous when it is applied regarding such elements as loss of companionship or mental distress, losses that are entirely subjective in the first place. This is not to deny that these losses exist; rather, it is to say that forcing a defendant only partially to blame to pay for all subjective injuries as well as objective, verifiable economic losses is to add insult to injury. Thus, by eliminating joint and several liability for noneconomic damages, we can restore some nexus between actual fault and the way in which we apportion responsibility for that fault.

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[7] Professor Twerski has recently analyzed the unfairness of the joint-tortfeasor doctrine and has concluded that the doctrine forces truly innocent defendants to settle cases for significant dollar amounts. Fear that 5% liability can result in 100% liability has an in terrorem effect on settlements. Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U. of Cal-Davis L. Rev. 1125, 1139-40 (1989); Also see, Henderson and Twerski, Products Liability Problems and Process 331-33 (1987).

9. Alcohol/Drug Intoxication Defense. The abuse of drugs and alcohol is one of the most serious problems facing our society, imposing extraordinary costs on government as well as the private sector. When an individual uses a product while intoxicated, that individual almost always jeopardizes more than his personal safety -- the threat extends to all those in harm's way as well. To allow this individual, injured because of his own misconduct, to use the civil justice system to obtain compensation from the product manufacturer is to perpetuate and compound the injury to society at large. Responsibility for the injury should remain squarely on the cause of the harm -- the individual himself. The state of Washington has already enacted a similar provision into law.[8]

Section 307 of S. 1400 creates a defense for manufacturers involved in products liability actions when the intoxicated plaintiff, because of his intoxication, was more than fifty percent responsible for the accident or event that caused the injury. State law will provide the basis for determining whether the individual was legally intoxicated or under the influence of intoxicating substances. Because of the burden drug and alcohol abuse already impose on government and society, this defense will not be available to manufacturers when it would result in leaving a defendant, other than a manufacturer or product seller, entirely liable for the harm.

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[8] Wash. S.B. No. 4630, Sec. 100.

Senator **Bryan**. Thank you very much, Professor Henderson. We appreciate your testimony. We will next hear from Miss Lipsen.

STATEMENT OF LINDA LIPSEN, LEGISLATIVE COUNSEL, CONSUMERS UNION

Ms. **Lipsen**. I am Linda Lipsen, legislative counsel for Consumers Union. I am here today representing Consumers Union, U.S. Public Interest Research Group, Consumer Federation of America and Public Citizens' Congress Watch. I ask now that my written statement be made a part of this record dealing with the technical aspects of this bill.

Thank you.

Senator **Bryan**. That will be the order.

Ms. **Lipsen**. I have had the privilege of appearing before this Subcommittee regarding product liability issues on many occasions now for the past six years, and this Subcommittee has always been more than fair and responsive in listening to our views, and in turn we have tried to provide balanced testimony to you, not sensational anecdote.

We are confident that one of the reasons that product liability legislation has never passed the Congress is your willingness to listen and to learn the real facts on the number of claims, on the cost of insurance, on the effects of this legislation on uniformity. We believe we have prevailed on each of these factual questions and we prevail to the point that the leading insurance trade association does not now support this bill. We therefore are distressed that the Administration and manufacturing community alike have turned to a new set of allegations, and this time dealing with product liability innovation.

We did not bring these misrepresentations to the subcommittee lightly. It is not our normal course of business to impugn, even indirectly, members of this Administration or witnesses before you. The Administration and the manufacturing community have asserted before this Committee that the product liability system prevented a totally safe substitute for asbestos—calcium sodium metaphosphate—from being marketed.

Vice President Dan Quayle stated recently, and I quote, "This is the quintessential example." The quintessential example is Monsanto Company's decision not to offer a safe——

Senator **Danforth**. Excuse me, Mr. Chairman. Miss Lipsen, I am sorry to interrupt, but could you tell me where in your written statement you refer to Monsanto or to the particular——

Ms. **Lipsen**. It is not part of my written statement. We wanted to be very sure about these allegations before we brought them before you. I brought them——

Senator **Danforth**. It is not in your written statement?

Ms. **Lipsen**. It is not in my written statement.

Senator **Danforth**. Your written statement is 21 pages in length, and this is nowhere in it?

Ms. **Lipsen**. I have submitted these records for—you should have them in a packet for this morning. I am sorry——

Senator **Danforth**. When did you submit this so-called packet, Miss Lipsen?

Ms. LIPSEN. I submitted it this morning.

Senator DANFORTH. What time?

Ms. LIPSEN. I believe it was 9:00 this morning.

Senator DANFORTH. 9:00 this morning?

Ms. LIPSEN. Right.

Senator DANFORTH. When did you submit your written testimony?

Ms. LIPSEN. I submitted my written testimony two days ago.

Senator DANFORTH. That would be on Tuesday?

Ms. LIPSEN. That is right.

Senator DANFORTH. What time on Tuesday, please?

Ms. LIPSEN. I believe—Senator Bryan was very clear about us getting our testimony in on time, and so we got it in at 10:30 in the morning.

Senator DANFORTH. 10:30 on Tuesday morning?

Ms. LIPSEN. 10:30 Tuesday morning. If this has caused you any hardship, I apologize.

Senator DANFORTH. It does not cause me the least bit of hardship. I am thinking only about fairness. When was this material typed up, Miss Lipsen?

Ms. LIPSEN. That material is from the EPA, and I believe the letter that went to Monsanto that you have before you is August 19, 1986, but it was not available to us.

Senator DANFORTH. This says 1974.

Ms. LIPSEN. Well, that what you are referring to——

Senator DANFORTH. When was this material in your hands?

Ms. LIPSEN. Very recently.

Senator DANFORTH. When?

Ms. LIPSEN. In fact, the material that you are pointing to right now was already made part of this record by Michael Cerrezi, who is the attorney in the——

Senator DANFORTH. When was the information that you are now testifying about in your hands?

Ms. LIPSEN. The information that I am now testifying about was not complete until I brought it to the Committee's attention yesterday.

Senator DANFORTH. It was not completed until yesterday?

Ms. LIPSEN. Yes, it was not complete. We were not sure about all of the allegations.

Senator DANFORTH. I see. What time was that yesterday?

Ms. LIPSEN. I believe it was by noon yesterday.

Senator DANFORTH. So you had one day that you have had this information?

Ms. LIPSEN. This is a matter of ferreting out the truth.

Senator DANFORTH. When did you decide you were going to testify about this?

Ms. LIPSEN. I would only have testified about this if I believed that the evidence——

Senator DANFORTH. When did you make the decision that you were going to testify about Monsanto?

Ms. LIPSEN. Yesterday.

Senator DANFORTH. Yesterday you made the decision?

Ms. LIPSEN. That is right.

Senator DANFORTH. The decision was not made before yesterday?

Ms. **Lipsen**. The decision was made based on clarification of the evidence that I had received. I believe that the Committee should know about this evidence. I have also heard repeatedly, even mentioned this morning, that this Committee is not going to have another hearing, and so I bring it to your attention because I thought it was serious enough for you to hear about it. I am not—believe me, Senator Danforth, I am not——

Senator **Danforth**. When did you first conceive of the idea of testifying about Monsanto?

Ms. **Lipsen**. I would only testify about Monsanto and this product and other products that are part of the record if I believed——

Senator **Danforth**. When did you conceive of the idea of testifying about Monsanto?

Ms. **Lipsen**. Possibly a week ago.

Senator **Danforth**. Why is it not in your written testimony?

Ms. **Lipsen**. Because I was not sure. I wanted to be sure.

Senator **Danforth**. Why is there no reference in your written testimony if you decided a week ago to testify about Monsanto? Why is there absolutely no reference to it? Why is there no hint in your written testimony?

Ms. **Lipsen**. Because this is about allegations that are extremely serious, and these——

Senator **Danforth**. Miss Lipsen, do you not think you should have warned the committee about allegations that are very serious?

Ms. **Lipsen**. The very nature of what we are criticizing are anecdotes and things that are really not clarified, and so we wanted to be extremely careful, extremely cautious about it.

Senator **Danforth**. I think you wanted to catch people unawares. That is why I think you did it in this manner.

Ms. **Lipsen**. I am sorry that you feel that way.

Senator **Danforth**. That is your strategy and it is not surprising to me.

Mr. Chairman, thank you for letting me ask these clarifying questions. I apologize for interrupting, and Miss Lipsen, you may proceed.

Senator **Bryan**. I might indicate, Senator Danforth, we will leave the Committee record open for the opportunity for anyone who is identified in this proceeding who has not previously had an opportunity to respond to do so, so that the record is complete and fair in every respect.

I know it is not your intention to delay further by asking for another hearing, but I do think that anyone who has not had an opportunity to make a statement who is specifically identified as a company or manufacturer should have the right to do so.

Senator **McCain**. Mr. Chairman, we all know, of course, that a statement submitted for the record is seen and heard by no one. It is much more spectacular to bring forth a charge that the people who are being charged are not aware of in any way, so I certainly appreciate that the record is being left open, but I share the concern of my colleague from Missouri that this is not unusual for this organization, but certainly not in the spirit of fair play.

Senator **Bryan**. Well, let us hear what the testimony is. I do not know what it is. I must say that I—as each of the other members of the subcommittee just received this packet this morning and I have not had a chance to read it.

Senator DANFORTH. I received it as I was asking the questions of Miss Lipsen, and that is hardly fair notice to anybody about what is going on.

I think that this is very typical of the Nader organizations who she says she is speaking for, to trash people—trash politicians, trash businesses, trash anybody who stands in their way, and that is exactly what is going on. It is a sneak attack. It is a sneaky, sneaky move on your part, but if that is your standard, Miss Lipsen, if that is the kind of witness you want to be, then please proceed with your sneak attack.

Senator BRYAN. Let us hear the testimony, and there will be plenty of opportunity for questions of Miss Lipsen and other members of the panel.

Miss Lipsen, if you will proceed.

Ms. LIPSEN. Senator Bryan, I would just like to say something in response to Senator Danforth. I work for "Consumer Reports" magazine. We are very careful; we are very cautious. I think you know that. I do not go after Members of Congress. That is not my personal style, nor would I ever. I think this is important information, and I would like——

Senator DANFORTH. Are you speaking for the Nader organizations?

Ms. LIPSEN. I am speaking for the Nader organizations as well on this testimony, but this is not something that we do lightly. I am sorry that you are upset about this. I certainly did not mean any unfairness by it.

Senator BRYAN. Let us hear the testimony. I am interested in hearing what it is.

Ms. LIPSEN. I am usually not this controversial.

A safe substitute for asbestos would be inordinately valuable to our Nation. 21 million Americans have been exposed to this product, and experts are estimating that it may be responsible for several hundred thousand deaths in the next 30 years. So we would welcome a truly safe substitute.

I am sure, however, this committee was not made aware that the EPA reviewed the test data on this asbestos substitute and found in a letter dated August 9, 1986 that there was reason to believe that it can cause cancer.

At this time I would like to submit this EPA analysis into the record.

Senator BRYAN. It will be part of the record by reference.

Ms. LIPSEN. We have been consulting with an independent scientist, the Chairman from Mount Sinai Hospital's Department of Environmental Medicine. He is a noted expert in the area of occupational disease. He also reviewed all of these documents, and he said:

> Based on my reading of this material, I am extremely concerned about the potential carcinogenicity of sodium calcium metaphosphate.
>
> I note when this material is injected intrapleurally into experimental animals it produces an increased incidence of fibrosarcoma as compared to unexposed animals.
>
> I note additionally that the rate of increased incidence of fibrosarcoma in the injected animals is comparable to the rate of increased malignancy that is observed

when crysotile is injected in a similar fashion. Crysotile is a well-known human and animal carcinogen.

This is from Dr. Landrigen's statement which is made part of the record.

The quintessential example of why the product liability system is not working is really the quintessential example to show that the product liability system is working to protect injured people from potentially dangerous products. Legislation that would allow manufacturers to ignore ominous test data concerning a substitute for a substance which is itself responsible for thousands of deaths should be defeated, we believe. If this asbestos substitute were the only example of a misstatement, we would not be so gravely troubled.

However, we have reviewed many of the other products cited by manufacturers as evidence of the need for S. 1400, and I would briefly like to discuss them with you.

Proponents have testified before this committee that Searle took its Copper 7 IUD off the market not because it was unsafe but because of unjustified wildcard verdicts. The history of this product tells a different story. Searle was warned as early as 1974 that this IUD should not be inserted in women who had never had children.

Yet, by 1975 about 40 percent of Searle's sales were to such women. Searle had evidence that these women were developing pelvic inflammatory disease which was the leading cause of sterility. They found that women were developing this disease at alarming rates. Despite this knowledge, the company continued this product to this vulnerable population.

The National Association of Manufacturers witness testified before you that Searle won all its suits but had to take the product off the market anyway. The reality is that Searle won the early Copper 7 suits, and they won because women could not get the evidence from the companies about the dangers of the product. They had to fight Searle for the evidence all the way to the Supreme Court. It was not until a judge ordered $65,000 as a penalty; it was not until four years; it was not until $10 million in legal fees was expended that Searle relinquished these documents. You know, women began to win these cases after that.

Searle's intransigence illustrates the uphill battles consumers face when they pursue product liability litigation. Manufacturers are in control of the evidence about what is defectively dangerous and what they know about the product. It is extremely hard to win these product liability suits.

Other examples that have been brought in this hearing room include the Sturm Ruger, which is a single action revolver known for its propensity to accidentally discharge. Mr. Ruger resisted incorporating a safety device on his gun for many years because the safety device would undermine the authenticity of the gun.

Manufacturers also mentioned the CJ Jeep. The CJ Jeep has a known rollover problem at very low speeds. If as the manufacturers claim that fear of product liability suits drove the CJ from the market, we believe that that assertion proves the system creates the right incentives. A bill like S. 1400 which would disturb these incentives should disturb all of us.

Manufacturers also cite the Puritan-Bennett anesthesia machine. Concern over defects in many of these machines was so acute that

Senator Wirth testified at a Congressional investigation before the Energy and Commerce Committee that corporate indifference led to the potentially unnecessary deaths of four unsuspecting patients and threatened the lives of untold others.

Secretary of Commerce Mosbacher has indicated in his testimony before this committee that if S. 1400 were approved, more of these types of products would be on the market. We do not need more CJs. We do not need more Sturm-Rugers or more defective anesthesia machines. We certainly do not need another asbestos tragedy. The way to stop litigation and resulting lawyer fees is to prevent product injuries. We urge you to oppose this bill.

[The statement follows:]

TESTIMONY OF

CONSUMERS UNION
CONSUMERS FEDERATION OF AMERICA
PUBLIC CITIZEN'S CONGRESS WATCH
U.S. PUBLIC INTEREST RESEARCH GROUP

PRESENTED BY LINDA LIPSEN

I. INTRODUCTION

Consumers Union,[1] Public Citizen's Congress Watch,[2] Consumer Federation of America,[3] and U.S. Public Interest Research Group[4] appreciate this opportunity to register our opposition to S. 1400, the "Product Liability Reform Act." S. 1400 would make it much harder, if not impossible in some cases, for victims of dangerous products to be compensated for their losses. We believe that consumers already face formidable obstacles preventing justifiable recoveries under the state product liability system. This legislation increases these hurdles without giving anything back to consumers.

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[1] Consumers Union is a nonprofit membership organization, chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its over 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

[3] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

[4] U.S. Public Interest Research Group is a national nonprofit, nonpartisan, research and advocacy organization. The group serves as the Washington, D.C. lobbying office for state PIRG's across the country.

Proponents of S. 1400 claim that these limitations on victims rights are necessary because of a litigation explosion. Yet the General Accounting Office, in a 1988 study, "Product Liability: Extent of Litigation Explosion in Federal Courts Questioned" found that between 1981-1986, the growth rate in product liability filings unrelated to asbestos, Dalkon Shield and bendectin rose only 6 per cent compared to a rise of 5 per cent in personal expenditures on goods. Similarly, the National Center for State Courts found that in a study of state court filings for a period 1978-1984, total tort filings increased 9 per cent, while the population increased 8 per cent.

Moreover, awards are neither erratic nor excessive. A 1989 GAO study entitled "Product Liability: Verdicts and Case Resolution in 5 States," reported that "total awards for compensatory damage show a strong relationship to the severity of the injury and the underlying economic losses." That is, juries award the greatest damages to victims with the greatest losses, as it should be. The GAO also found that plaintiffs won in fewer than 50 per cent of the product liability cases studied.

Though proponents have always argued that legislation like S. 1400 would bring down insurance costs, the lead property casualty insurance trade association, the AIA recently testified before this committee that this legislation would have no effect on insurance rates for businesses. Strangely, given the crises in insurance costs which ocurred in the mid-1980's, this legislation would not even track insurance payouts or require the insurers to submit data, so that Congress would be better informed about the true cause of escalating costs the next time rates take off.

Proponents also claim that S. 1400 is needed to reduce the "chaos and unpredictability" of the product liability system by establishing uniform rules among the 50 states. Clearly, proponents want predictability of outcome----not uniformity in the law of product liability. Almost without exception, S. 1400 employs "one way uniformity", establishing a uniform law only where it would benefit manufacturers. Where preemption would benefit consumers, the bill is silent. As the following provisions of S. 1400 illustrate, where uniformity would help victims, the theme is abandoned, and states are left to retain and expand a patchwork of laws unfavorable to consumers:

> S. 1400 eliminates joint and several liability for noneconomic damages, but it does not establish joint and several liability as the rule for economic damages. Therefore, the rules governing the liability of multiple defendants in product liability suits would continue to vary from one state to another.
>
> S. 1400 would raise the burden for receiving punitive damages and would bar punitive damages for products with pre-market FDA or FAA approval (in the absence of fraud), but it would not establish the right to receive punitive damages uniformly throughout the country.
>
> S. 1400 does not contain any caps on damages, a point repeatedly raised by proponents in a desperate attempt to assert the fairness of the bill. Yet the legislation would not abolish caps enacted in states in recent years. Thus the bill would do nothing to remove the most unjustified barrier to recoveries at the state level.

The uniformity of this bill is its unfairness to consumers.

S. 1400 seems to cry out this statement from its pages, "Heads manufacturers win, tails consumers lose!" There is no justification for making it more difficult than it is already for injured consumers to receive adequate compensation for their losses. Pursuing compensation through product liability litigation is an uphill struggle for consumers. Unquestionably the provisions of S. 1400 would result in more uncompensated victims and we believe more dangerous products on the market.

II. JOINT AND SEVERAL LIABILITY

S. 1400 would repeal the doctrine of joint and several liability as it is applied to "non-economic damages". We object to this provision because it would prevent the recovery of full compensation for victims who through no fault of their own happen to be injured by more than one defendant. We further object to any provision which would treat non-economic damages differently than economic damages. A person horrendously injured by a defective product, who is prevented from recovering her full compensation for pain and suffering, is not being made whole. Pain and suffering is real loss. A burn victim of a dangerous product with disfiguring injuries experiences real loss; a woman who due to a defective IUD loses her ability to have children experiences real loss. Clearly, non-economic, or pain and suffering losses can be as devastating as those which are measurable "economic" losses. Many product injury victims would be severely undercompensated if their recoveries depended upon a calculation of wage loss, medical and other expenses.

We believe that a careful examination of the purpose and application of this legal doctrine will demonstrate how joint and several liability enhances the consumer protections embodied in our civil justice system. The doctrine of joint and several liability plays a crucial role in furthering the fundamental goals of the nation's product liability laws. By increasing the likelihood that makers of excessively dangerous, defective products bear the full cost of the injuries their products cause, joint and several liability reinforces the safety incentives and compensation objectives of the product liability system. Contrary to recent criticisms, application of joint and several liability in product liability cases has streamlined the litigation process and promoted fair dispute resolution.

A. Limited Application of Joint and Several Liability

The doctrine of joint and several liability is designed to yield fair results in the very difficult and complicated circumstance where the inappropriate activity of more than one party contribute to cause a discrete injury. Courts invoke joint and several liability only when wrongdoers act in concert or when the harm they cause cannot be divided among them in a logical fashion. Rather than make innocent victims go uncompensated or undercompensated just because of the peculiar circumstances of their injuries, joint and several liability allows plaintiffs to recover all their damages from any wrongdoer whose injurious conduct played a significant role in causing the harm.

For example, when two hunters standing side-by-side in a posted "no hunting" area, using the same ammunition shoot in the same direction and both of the bullets fatally wound a bird watcher, it is virtually impossible to determine which hunter caused the death even though it is clear that both hunters were negligent and each could have caused the death acting alone. Without joint and several liability, it may be impossible to find either of the hunters liable or recover all damages because a plaintiff (the bird watcher's survivors) could not prove either hunter's precise amount of fault or that either hunter caused the death.

Joint and several liability does not apply to situations where the conduct of several parties causes harm that can be divided on the basis of each party's behavior. For example, if the hunters had used different ammunition and wounded the bird watcher's arm and leg, each hunter would be held responsible for the precise injury his/her bullet caused. More important, joint and several liability does not apply in situations where a party's conduct has only played a slight or insignificant role in causing an injury. To invoke the doctrine against a defendant, the injured party must show that the defendant's behavior alone could have caused the entire injury or was an essential factor in causing individual harm. To prevent injustice to defendants guilty of the least egregious behavior, courts generally allow defendants to implead or join other parties who may be more responsible for the harm, or allow separate lawsuits against such parties.

B. Joint and Several in Product Liability

In product liability disputes, joint and several liability helps to create a level playing field between individuals injured by defective products and the companies responsible for putting such products into the stream of commerce. Product liability plaintiffs have the difficult task of proving their injuries were caused by products that are unreasonably dangerous and defective. To succeed, plaintiffs must overcome the numerous obstacles involved in amassing evidence about the dangers of a product, finding experts who can demonstrate the product was defective, and determine, often in very complicated circumstances, that the product caused the precise injury that occurred.

Without joint and several liability, individuals injured by defective products would have to sue everyone with even a remote connection to the injury and prove the precise responsibility of each defendant to recover all damages. At the very least, this would shift the burden of accumulating all the facts relevant to determine the precise degree of fault of each wrongdoer from defendants (who are in the best position to know what they did and why) to plaintiffs (who have the least information and expertise concerning product manufacture, design and marketing).

If joint and several liability is limited like it would be under S 1400, many types of injuries may go uncompensated or undercompensated. Injuries related to toxics, such as asbestos, often develop many years after exposure. Because of the difficulty in identifying responsible parties many years after exposure, the complicated interaction of chemicals in the environment and in people's bodies that contribute to injury, and the complexity in charting the path of highly mobile chemicals through the environment, it is impossible for those injured by most toxic substances to prove who is responsible for what part of their harm.

Similarly, where product injuries occur in the context of complicated procedures involving the interaction of many individuals and pieces of equipment -- such as surgery -- plaintiffs may be unable to determine the responsibility of each party. This situation is exacerbated when, in addition to complex human and mechanical interaction, the injury involves an explosion, as in a general-aviation air crash, that hinders recovery of evidence essential to establish responsibility. Without the benefit of joint and several liability, innocent victims would have a difficult time finding an attorney willing to accept the nearly insurmountable risks involved in toxics and other complex litigation.

Elimination of joint and several liability would undermine the product-liability goal of making the innocent victim whole, whenever responsible parties are immune from suit, underinsured, bankrupt or not subject to jurisdiction in the state where suit is filed. While in some instances it may seem harsh to hold a defendant jointly liable for the actions of other wrongdoers, it makes more sense to place this burden on a party responsible for causing the harm than on the innocent, injured plaintiff.

It is particularly appropriate to apply joint and several liability once it is established that a defendant is substantially responsible for harm caused by a product that is unreasonably dangerous and defective. Since product defendants must be significant contributors to the unreasonable danger or defect in injury-causing products to be held jointly liable, these wrongdoers, and not innocent victims, should pay the share of an absent defendant. Under joint and several liability, manufacturers are forced to internalize the cost of product accidents, which creates stronger financial incentives to improve the safety of their products. This result is consistent with the product liability goals of accident prevention and full compensation for injuries caused by defective products.

For the very same reasons that joint and several liability enables plaintiffs to succeed in product liability lawsuits, it creates a strong incentive to settle disputes and avoid litigation. Once aware that their injurious conduct played a significant role in causing plaintiffs' harm, defendants have strong reason to reach an out-of-court settlement, rather than litigate and thereby risk liability for the entire harm. Defendants are often in the best position to assess the likelihood of successfully obtaining contribution from other wrongdoers, which helps lead settlement negotiations toward a reasonable conclusion and eliminates significant transaction costs by avoiding full-blown litigation.

Without joint and several liability, individuals injured by defective products would have much greater difficulty obtaining adequate settlements, would need to sue many more potentially responsible parties to have an opportunity for full compensation, and would be more likely to litigate their claims. Knowing the difficulties plaintiffs would have in proving the degree of each defendant's responsibility, especially when many interacting forces are involved -- as in toxics or other complex litigation, defendants would have much weaker incentives to settle disputes. In addition, whenever a third party may arguably be responsible for a portion of the harm, defendants who are clearly liable would be likely to make significantly smaller settlement offers since it is unlikely they would be held responsible for all damages at trial.

Facing intransigent defendants, smaller settlement offers and the need to recover from all wrongdoers to be made whole, plaintiffs with significant losses would be likely to sue more parties and press their cases to trial in the hopes of obtaining more than partial recovery. Elimination of joint and several liability could increase and complicate litigation, while also preventing victims of toxic exposure and other indivisible harms from recovering a penny.

C. Fallacies About Joint and Several Liability

Many proponents of tort law modification have inappropriately associated joint and several liability with problems that sound significant but do not actually exist. It is not uncommon to hear joint and several spoken of in the same breath as "deep-pocket liability" and "lawsuit-happy [plaintiffs who sue everyone in sight just to extract a settlement." Although there are no systematic studies measuring the effect of joint and several liability on our civil justice system, there is strong evidence that the doctrine has promoted efficiency and fairness in resolving product liability disputes.

Data from a number of closed claims studies show that plaintiffs seldom sue more than one party. The Insurance Service Office's survey of product liability verdicts and settlements found that only one defendant was named in 72 percent of the claims. More general data from University of Wisconsin and Institute for Civil Justice studies of court verdicts for all tort cases show that 5-60 percent of tort lawsuits involve only one defendant. In all of these surveys, the average number of defendants was between one and two.

A recent survey of the largest, wealthiest corporations in America provides strong evidence that the one party victims tend to sue for their injuries is often not a "deep-pocket." The Conference Board survey of 232 major U.S. corporations with minimum annual sales revenue of $100 million found that the "larger economic issues" for these corporations are unaffected by the "pressures of product liability," and the suits they are involved in are "overwhelmingly settled out of court...for sums...considered modest by corporate standards." It is hard to imagine that these large corporations would so readily dismiss the costs of product liability if they were constantly sued as a deep-pocket defendant. Clearly, individuals injured by defective products are not using the doctrine of joint and several liability to sue well-heeled corporations with a tangential relationship to legal disputes instead of those most responsible for the injuries.

Since parties who are not significant contributors to an indivisible harm cannot be held jointly liable and there is no explosion in numbers of defendants per lawsuit or unfair focus on deep-pocket defendants, it is hard to understand why joint and several liability has been identified as a problem in tort litigation. It is clear that product manufacturers, distributors, sellers and their insurers have an incentive to eliminate or modify joint and several to reduce their financial exposure. However it is absolutely unclear that the doctrine does anything more than protect innocent victims of dangerous, defective products and reduce transaction for both economic and non economic damage costs associated with litigation. Without joint and several liability, product liability's ability to promote increased product safety and adequate compensation for product injuries would be vastly diminished.

III. PRODUCT SELLER LIABILITY

We have major concerns about the product seller provision for reasons of public policy. First, product sellers can, and often do, inspect and test their products for quality and safety. Therefore, it is fair to hold sellers responsible for injuries that these products cause. Second, by holding product sellers to a high standard of care, the law encourages quality control practices, which will lead to safer products. Third, product sellers can exert substantial pressure on manufacturers to produce safe products by refusing to carry unsafe and untested goods. Sellers will be most inclined to apply this pressure if they are held responsible with manufacturers for dangerously defective products.

IV. PUNITIVE DAMAGES

We oppose S. 1400's treatment of punitive damages. Sec. 303 states that punitive damages may be awarded where the harm suffered was the result of conduct demonstrating the manufacturer or product seller's "conscious flagrant indifference to the safety of those persons who might be harmed by a product."

This formulation of the standard of proscribed conduct is far too narrow and would eliminate cases were punitives are appropriate. At the very least, Section 303 should allow punitives for reckless behavior. Punitive damages should be employed to punish and deter reckless conduct as well conscious indifference to safety concerns. The manufacturer's or product seller's reckless or conscious indifference to safety or the rights of others is sufficient to describe the type of behavior punitives are designed to reach. The standard is also unduly confusing. This language suggests that the defendant could escape a punitive damage assessment if he were to show that the plaintiff (though injured) "was not a person who might be harmed by the product." The provision would also increase transaction costs.

If a plaintiff wished to pursue punitive damages, he or she would face at least two trials: the first to determine whether compensation damages should be awarded, and the second to determine whether punitive damages should be awarded and if so what amount should be assessed against the defendant. Accordingly, plaintiffs would first have to prevail on their liability claim and then proceed to another trial where much the same evidence would be presented on punitive damages. Under current law, judges upon motion, may separate these proceedings to prevent undue prejudice. Since, courts already have the authority to separate these functions, where it is justified, it is unnecessary to require this procedure by statute.

S. 1400's punitive damage provision would allow manufacturers and product sellers to escape punitive damages where they establish compliance with FAA or FDA standards or requirements. (See Section 303 (c) (1) and (2)). We are submitting a separate report on the FDA punitive damage defense. But generally, this absolute bar to punitives is totally unjustified. Under present law, compliance with a federal standard is only some evidence of due care, but should not be given conclusive weight.

Government safety standards do not necessarily establish an acceptable level of safety, and in fact, may only establish a minimum safety floor. This provision undercuts safety incentives by allowing manufacturers to be shielded from a punitive award, just because they may have complied with a hopelessly outdated and/or under-protective standard. Moreover, this defense may actually encourage manufacturers to take a lowest common denominator approach to safety, since they would not be punished for failing to take adequate safety precautions where a government standard required far less care.

The rationale for disallowing compliance with government standards as a defense to punitives was clearly stated in Gryc v. Dayton Hudson Corporation, 297 NW 2d 727, Minn.) cert. den. 449 U.S. 921 (1980). In Gryc, manufacturers of highly flammable children's nightwear attempted to use their compliance with the Flammable Fabrics Act as a defense to a punitive damage claim. The court ruled that the fabric manufacturer could not defend itself conclusively from punitives by proving its compliance with a government regulation widely known to be far too lax to have any real protective effect.[5]

Compliance with government standards is highly probative of the manufacturer's conduct and therefore is an appropriate factor for a jury to consider in a punitive damage case. However, such compliance with government standards should never serve as an automatic bar to punitive liability.

The drug manufacturers and general aviation manufacturers argue that they deserve this special treatment because their industry receives extensive regulatory scrutiny. Leaving aside the FDA issue since we will be dealing with it in a separate report, the FAA is required to set only minimum safety standards by statute. See Federal Aviation Act of 1958, 49 U.S.C. 1421 (a) (1) Supp. 1985). Compliance with these standards indicates no more than the manufacturer performed the minimum effort required to make a product safe. See RESTATEMENT Sec. 288C (1969). See also, Wilson v. Piper Aircraft Corp. 282 Or. 61, 577 P. 2d,1322 (1978); Rucker V. Norfolk & Western Railway, 77 Ill. 2d 434, 396 N.E. 2d 534 (1979). Government standards may not reflect the state of knowledge of the industry concerning all safety consequences of industry practices.

More important, FAA regulation often amounts to nothing more than self-regulation by the industry. In certifying the design, manufacture and airworthiness of a craft, "by regulation, the FAA has made the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements." (U.S. V. S.A. Empressa De Viacao Aerea Rio Grandense Varig, 467 U.S. 797, 104 S. Ct. 2761, 2756 (1984); see also 14 CFR § 21.33, 21.35 (1983)]. As the Supreme Court explained in Varig, the intimate involvement of aircraft manufacturers' employees themselves in the certification process is compounded by the FAA's own practices:

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[5] Under the Flammable Fabrics Act, the government reported that every one of the 230 garments recovered from 159 burn cases involving 17 deaths passed the statute's test for rapid burning.

> With fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone. Accordingly, 49 U.S.C. § 1355 authorizes the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons. By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist in the FAA certification process. 14 CFR § 183.29 (1984). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development. See generally Improving Aircraft Safety pp. 29-30. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification. 14 CFR § 183.1 (1984). In determining whether an aircraft complies with FAA regulations, they are guided by the same requirements, instructions, and procedures as FAA employees. FAA Order 8110.4 p. 151; CAA Manual of Procedure § .70(b). FAA employees may briefly review the reports and other data submitted by representatives before certificating a subject aircraft. Improving Aircraft Safety 31-32; FAA Order 8110.4, p. 159; CAA Manual of Procedure § .77.

In view of this, it is not surprising that the Supreme Court of California concluded in Elsworth v. Beech Aircraft Corp., 208 Cal. Rptr. 874 (1984):

> Here, there can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes, in spite of the fact that federal law may have completely occupied the field of regulation of aircraft safety and certification. The Federal Aviation Act of 1958 expressly declares that its provisions are not intended to abridge remedies that a party may have under state law. (49

U.S.C. § 1506).

Finally, it is ironic that the same community of airplane makers and users, known for opposing regulation by the FAA, is now seeking to hide behind such regulation as a means of avoiding liability. Although this defense is unavailable to defendants where the plaintiff shows they withheld or misrepresented information that is material and relevant to the performance of the product, there are a significant number of manufacturers who would wrongly escape penalties under this provision. A provision which completely excludes a manufacturer from liability for punitive damages based on approval or compliance with an agency that is ineffective in monitoring evidence, and which relies on the honesty and integrity of those being regulated is both misguided and completely inappropriate.

V. STATUTE OF REPOSE

Consumers and workers injured by 25 year old capital goods would not have the right to pursue a lawsuit under S. 1400. This legislation would automatically cut off remedies even before the injury or death occurred or before these claims reasonably could be asserted. This automatic cut-off would operate to prevent recoveries, irrespective of the useful life of the product, which varies greatly from one product to the next.

It is illogical to bar just, provable claims, without any regard to the underlying cause of the injury solely because of the age of the product. For example, most general aviation aircraft are designed to be flown for more than 25 years. The statute of repose will remove the incentive of manufacturers to investigate and remedy defects in 25 year old planes -- a terrible result considering that manufacturers are in the best position to learn of potential safety hazards. In a recent accident in Maryland, a 34 year old Beechcraft caught fire and crashed into a house killing the pilot of the plane and a seven month old baby in the house. Federal records over the last five years showed four other instances of fire, smoke or leaking fuel in the same model Beechcraft. We believe the survivors of the pilot and the family of the baby, should have the opportunity to recover compensatory damages if a defect is found responsible for the fire and crash.

We view these provisions as unduly harsh and unnecessary. Most successful product liability lawsuits do not involve old products. One comprehensive study revealed that only 2.7 per cent of the products involved in product liability actions were purchased more than 6 years prior to the injury causing event,[6] A survey of Utah's manufacturers similarly showed that only one of its 500 members had a claim filed against it for injuries resulting from products more than 6 years after the original purchase.

The statute of repose may not even be permissible under the Constitution. Seven States have invalidated similar provisions because of their impact on the due process rights of victims. Additionally, the provision would deny similarly situated victims of dangerous products equal protection under the law and the right to a jury trial.

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[6] 5 Law Alert 126 (1986)

It is extremely difficult to prove the existence of a defect in an old product. However, we do not think it appropriate for Congress to take away that slim possibility, where such a finding is justified on the facts of the case.

VI. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

We favor the development and implementation of alternative dispute resolution systems and commend the states for their leadership in this area. The proposal for ADR contained in S. 1400, while interesting, is fatally flawed. The penalty for failure to accept reasonable settlement offers is attorney's fees for both defendant and plaintiff. Under this regime, an injured victim of a dangerous product, who has absolutely no control over the defendant's hourly billings would accept unreasonable offers of settlement for fear of a penalty of enormous proportions. We would be happy to provide the Committee another model which would function more fairly for both plaintiffs and defendants.

VII. CONCLUSION

This legislation would only add to the considerable burdens faced by injured consumers when they pursue their remedies through a product liability lawsuit. There is no evidence that such "reform" would solve any of the problems manufacturers assert. We urge Congress not to legislate based on unproved assertions, where the result would be more uncompensated victims and more dangerous products in the stream of commerce.

Consumers Union
Publisher of Consumer Reports

May 24, 1990

The Honorable Senator Richard Bryan
United States Senate
Washington, D.C. 20510-2804

Dear Chairman Bryan:

During the May 10 hearing on S. 1400 before the Senate Commerce Committee, I discussed the manufacturers allegations concerning the product liability system's effect on product innovation on behalf of CU, Consumer Federation of America, Public Citizen's Congress Watch, and U.S. Public Interest Research Group. Proponents for this legislation argue that current laws stifle innovation and keep "safe" products off the market. We investigated a number of the manufacturers' examples and found that the products cited to show a product liability system out of control, actually demonstrate the effectiveness of existing laws at removing from the market dangerous and defective products.

My oral statement discussed in detail an asbestos substitute which caused cancer in a standard test, and the Copper 7 IUD, a birth control device which led to sterility. Other products were not discussed in as great a detail, and I would like to provide this information for the hearing record.

THE STURM RUGER "OLD MODEL" SINGLE ACTION REVOLVER

Proponents cite the Sturm Ruger "Old Model" single action revolver as an example of the unfairness of the product liability system on manufacturers. Instead, the history of this product and the company's persistent failure to make the gun safe tells a different tale. After reviewing the manufacturer's obdurate resistance to including a safety device on this gun, it is astonishing that anyone could argue that the manufacturer was a victim of the product liability system.

Sturm Ruger's disregard for product safety is illustrated by the fact that the company designed and manufactured the "Old Model" without incorporating a safety device designed to prevent accidental discharges. Such devices are routinely incorporated to prevent serious injury or death in the vast majority of firearms and are required by federal law on imported handguns.

Bill Ruger, CEO of Sturm Ruger and chief designer of the "Old Model", has stated in a sworn deposition attached to this letter, that a decision was made not to include a safety device because in his opinion, any positive safety device "would be

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perfectly unacceptable to the average user." Asked to elaborate as to his reasoning, Mr. Ruger stated, "It is simply not part of the idea of a revolver, which is supposed to be designed in a traditional way, and which is not supposed to be handicapped by having to disengage a safety in a preliminary gesture or movement."

Sturm Ruger knew in 1968 that the design of this gun made it prone to accidental discharge. In 1968 the U.S. banned imported handguns that could not meet a specific safety test. One of the purposes of the test is to identify weapons prone to accidental discharge. Single action revolvers are required to withstand the impact of a weight equal to the weight of the revolver dropping from a distance of 36 inches in a line parallel to the barrel upon the rear of the hammer spur, a total of five times.[1] In 1968, the Bureau of Alcohol, Tobacco and Firearms (ATF) subjected several revolvers, including the "Old Model" to this drop test. The Ruger failed the ATF test. The company did not respond to these results by improving the design of the revolver.

Subsequently, Sturm Ruger conducted its own drop tests. Again, the "Old Model" single action failed. Indeed, Bill Ruger in describing the in-house drop test, in a sworn deposition stated that they did not measure the force necessary to discharge the weapon with a blow to the hammer when the hammer was in the "down" position, "because such a light blow would be sufficient to cause discharge." In practical terms, this could mean that if a person were to carry the gun with the hammer in the "down" position, a slight bump on hammer, such as hitting it on a door frame, would cause the weapon to shoot. Ruger did nothing in response to its own test results to make the gun safer.

Since 1962, Ruger has received reports of serious injuries and deaths resulting from accidental discharges of the "Old Model." It was not until 1973, that Ruger incorporated a transfer bar safety device[2] into the design of the weapon (these redesigned guns are called "New Models"). In sworn testimony, Ruger estimated that between 1968, when Ruger learned that the gun was prone to accidental discharge, and 1973 when the weapon was redesigned with a safety device, more than 150,000 "Old Models" were sold. (Approximately one million guns are still owned by consumers.)

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[1] Bureau of Alcohol, Tobacco and Firearms factoring criteria for weapons to be imported into the U.S. (See Attachment 1).

[2] A transfer bar safety device prevents the hammer from contacting the firing pin and discharging the weapon by creating a space between the hammer and firing pin when the weapon is in the "safe" position. This prevents the energy required to discharge the gun from being transferred from the hammer to the firing pin.

Although Ruger continued to receive reports of accidental discharges causing serious injuries and deaths, and the "Old Model" was implicated in 20 - 30 product liability lawsuits per year filed against the company, Ruger again stated in a sworn deposition that he never considered recalling the "Old Models."

In 1979, an Alaska court found Sturm Ruger liable for punitive damages in a case involving the accidental discharge of an "Old Model." The court found that Sturm Ruger knew that its product was defectively designed, and that injuries and deaths had resulted from the design defect but that Ruger continued to market the product in reckless disregard of the public's safety.[3] Still, Ruger did not act to remove the dangerous "Old Models" from the hands of consumers.

By 1989 approximately 230 product liability claims had been filed against Ruger involving serious injury or death from accidental discharges of "Old Model" single action revolvers. The gun has never been recalled.

Sturm Ruger's annual 10K forms filed with the Securities and Exchange Commission routinely state under the heading, Legal Proceedings, "Claims for punitive damages on "Old Model" single-action revolvers are material." Before the descriptions of the newly filed product liability cases, Ruger offers the disclaimer, " Management believes that, in every case, the allegation of defective product design are unfounded, and that the accident and resultant injuries or fatality were due to negligence or misuse of the gun by the plaintiff."

PURITAN-BENNETT ANESTHESIA GAS MACHINES

Anesthesia gas machines, manufactured by Puritan-Bennett Co. are products raised as evidence of the product liability system unjustly forcing manufacturers to remove "safe" products from the market.[4] If Puritan-Bennett stopped manufacturing its defective anesthesia machines because of the product liability system, the system is working. While few facts about these allegedly "safe" products are offered by proponents of S. 1400, the effectiveness and safety of several Puritan-Bennett machines was the subject of an extensive hearing by the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, September 26, 1984. Puritan-Bennett's Foregger Model 705/710 machines were implicated in four deaths between June, 1983 and September, 1984. The investigatory hearing was designed to examine the company's response to deaths and problems associated with its machines.

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[3] *Sturm Ruger and Co. v. Day* 594 P. 2d 38 (Alaska 1979).

[4] Testimony of Peter Huber (Appendix) and Secretary Mosbacher before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, April 5, 1990.

According to the hearing transcript, the first two deaths occurred to patients undergoing routine surgery in May and June 1983. Both deaths were caused by an overdose of anesthetic agents. This company did not notify the FDA of either death. The FDA's onsight investigations of one of the machines involved in these deaths disclosed that a spool valve had stuck, resulting in an overdose. A rubber "O" ring in the valve swelled from exposure to high concentrations of anesthetic gases. This problem of anesthetic gases causing "O" rings to swell was known in general in the 1970's, and was reflected in an appendix to the 1979 voluntary performance standard for anesthesia machines issued by the American National Standards Institute.

The Energy and Commerce investigation revealed that the third death also occurred to a patient undergoing relatively minor surgery. The investigation further noted that the company failed to aggressively investigate the problem, and that they did not notify the FDA of this death until nine months later. The Committee also found that a fourth death occurred in February 1984, again to a patient undergoing relatively minor surgery. The FDA informed the Committee that it had investigated this matter in response to a rumor, not because the company had reported the death. The FDA's investigation revealed a different valve -- the mode selector valve-- malfunctioned, which could have resulted in an insufficient supply of oxygen to the patient.

The FDA also testified to two other problems with these machines which could be potentially serious. One was a complaint of a malfunction of another type of valve, the oxygen flush valve, in models 100 and 300. The FDA further testified that a second problem involved "underdosing" in two Puritan Bennett model 705 units. The agency determined this was caused by "wobbling of a "T" handle due to cracks in the epoxy used by Puritan Bennett.

FDA stated Puritan Bennett "appears . . . [to have] failed to conduct adequate design review of certain critical components" including the use of rubberlike materials in the presence of high concentrations of particular anesthetic gases, and the design of the manifold and turret. The FDA noted the permanent fix to the "O"-ring problem was the replacement with a mechanical action, and questioned whether this "more reliable mechanism should not have been a part of the machine's earlier design." (testimony by

John Villforth, Director, Center for Devices and Radiological Health, FDA p. 5-8)

After the first two deaths, Puritan Bennett instituted a recall. However it limited its recall to those valves distributed between September 1982 and July 1983--- only 60 of the valves already marketed. The FDA required the firm to extend the recall to all valves distributed through July, 1984. (Villforth's written testimony (p. 13))

THE CJ-5 AND CJ-7 JEEPS

Another product raised as an example of the system unjustly harming manufacturers and impeding innovation is the CJ line of jeeps manufactured by American Motors Corporation's (AMC) subsidiary Jeep Corporation.[5] The facts surrounding the lack of safety of the CJ-5 and CJ-7 and AMC's response to remedy the dangers of the CJ Jeeps, instead tell a different story.

AMC manufactured the CJ-5 between 1973 and 1983, and produced the CJ-7 between 1976 and 1986. Both models were aggressively marketed for passenger and recreational use. However, due to the narrow track width, the high center of gravity, and the short length, the vehicles were extremely unstable and susceptible to rolling over -- even at low speeds and in response to normal on-road driving conditions.

AMC's advertising of the CJ Jeeps encouraged drivers to take the types of risks that were likely to cause rollovers. One ad showed the Jeep making sharp turns of the sort that cause roll-overs when driven on-road at only 22 mph. In 1982, the Federal Trade Commission issued a complaint charging AMC with running ads which falsely portrayed Jeeps as safe enough to drive recklessly off-road, and otherwise could be handled like ordinary passenger cars on pavement. AMC admitted no wrongdoing but agreed to stop running the ads and to note the dangers and unique attributes of the Jeep in their owners manuals.

Despite years of testing, by independent researchers and by AMC itself showing that the Jeeps had a much greater propensity to roll over, AMC continued to deny the dangers. The company continued to maintain there was no problem.

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[5] See Peter Huber's testimony (appendix) before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation on April 5, 1990.

Small utility vehicles such as the Jeep CJ-7 have occupant death rates of nearly five times the rate of large cars.[6] The problems associated with the CJ jeeps involve both the ease with which the vehicles roll over and the ease with which occupants are ejected. In a study of the Risk of Fatal Rollover in Utility Vehicles conducted in 1988, the CJ-5 was 19 times more likely to be involved in a fatal rollover per registered vehicle than a passenger car. The CJ-7 ranked 12.3 times that of a passenger car.

AMC has consistently denied the danger of their CJ series jeeps, despite mounting evidence showing the ease with which they roll, and eject their occupants. It is only through product liability suits and the threat of punitive damages that AMC finally stopped production of these deadly machines. There are still hundreds of thousands on the road, with most owners completely in the dark about the ease with which these vehicles can cause the death or injury of its occupants. To represent the CJ Jeep as an example of the product liability system gone haywire is ludicrous at the very least. In fact, the history of this product shows quite clearly the necessary role the product liability system plays in driving from the market dangerous products like these jeeps.

CONCLUSION

The Secretary of Commerce indicated in his testimony before this Committee, that if S. 1400 were approved, more of these types of products would be on the market. In view of the foregoing, we urge this Committee to abandon its interest in passing such legislation.

Sincerely,

Linda Lipsen
Legislative Counsel

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[6] Insurance Institute For Highway Safety, Status Report, Vol. 22 No. 2, February 28, 1987.

Senator **Bryan**. Thank you.

We will hear next from Mr. Kingham.

STATEMENT OF RICHARD KINGHAM, COVINGTON & BURLING, ON BEHALF OF THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION

Mr. **Kingham**. Thank you, Mr. Chairman. I am here today to represent the Pharmaceutical Manufacturers Association, which is the national trade association of manufacturers of prescription drugs. The Pharmaceutical Manufacturers Association supports the principles embodied in section 303(c) of the bill before you, which would establish a limited defense against punitive damages for drugs that are approved by the Food and Drug Administration when no required information is withheld from the agency in the course of the approval and marketing of the product.

I request that my written statement, which has previously been submitted, be entered into the record.

Senator **Bryan**. That will be the order, Mr. Kingham. We will make that part of the record.

Mr. **Kingham**. Thank you very much, Mr. Chairman.

I would like to take the time available to me to respond very briefly to certain statements made in the prepared submission by Dr. Wolfe which is before you today, if I may do that.

Dr. Wolfe's presentation makes essentially three points: First, that FDA standards are minimal, that the agency's resources are limited, and that the generic drug investigation which is under way at the present time shows that FDA and its officials are vulnerable to corruption.

Next he cites three specific examples of what he believes are deficiencies in FDA's regulation of drugs and devices.

Finally, he argues that there is no problem, that punitive damages do not pose an obstacle to development and research in the pharmaceutical industry.

Let me answer his last point first. We believe there is a problem. Our statement and the Supreme Court amicus brief which we attached to it set forth a number of documented examples of the adverse effects on research and development in the pharmaceutical industry due to product liability litigation, and in particular to the risk of punitive damages. These include adverse effects on research on vaccines, on contraceptives and on drugs for use in pregnancy. I believe that these examples, which are well documented, are only the tip of the iceberg.

There are a number of reasons why pharmaceuticals are particularly vulnerable to the risk of punitive damage claims. First, all prescription drugs entail risks. For example, 300 people die each year from anaphylactoid reactions to penicillin. That does not mean that penicillin or other prescription drugs are unsafe. It means that the decision to market any prescription drug is a risk-benefit decision in which the interests of all patients have to be considered. The FDA's job is to make that decision. We believe it does a good job.

Juries by their very nature look at one single injured individual. They do not have before them the thousands of people who have benefited from a drug.

Dr. Wolfe in his statement recognizes another problem which prescription drugs pose. No matter how much testing we do before they are marketed, inevitably we discover risks and safety issues after they are marketed.

According to current estimates, it takes approximately 12 years of testing and review to bring a new chemical entity—that is, a new pharmaceutical product—to the market, and the fully allocated cost of research is over $200 million. Clearly, it would not be in the public interest to extend existing testing further since that could deny beneficial medicines to the public.

The limitations on premarket testing mean, however, that we must accept the fact that we will discover and need to respond to safety issues after drugs are marketed. There is a system in place to deal with those issues, but it is a difficult system to explain to a jury in an individual case when someone has been unavoidably injured.

Despite all these problems, punitive damages might be conceivably warranted in pharmaceutical litigation if they really did deter wrongful conduct and promote safer products. I believe they do not have those effects. Punitive damages are like lightning striking. They are not predictable. One cannot judge the future in terms of punitive damage law, and they have little deterent effect.

The one thing you can know, however, is that punitive damages have made some areas so risky that it may be undesirable to conduct any programs of research and development in them at all. I believe that has happened with certain areas of research involving vaccines, contraceptives and pregnancy drugs. That is a disincentive to safety, because safety in the pharmaceutical arena is largely served by research to develop newer and safer products. So ultimately I believe the current system is a disincentive to increased safety.

Let me turn now to the FDA. The FDA has over 7,000 employees, and close to 2,000 of them in one way or another are involved in the regulation of drugs. There have been fluctuations in the number of people who work for the agency, but it still is by far the largest drug regulatory authority in the world, and it applies the most sophisticated and demanding requirements for proof of safety and effectiveness of any similar agency that I know of, including agencies in countries like Germany and Britain.

If the agency has a fault in the drug approval process, it is conservatism, not willingness to take risks. That conservatism has been associated with delays in the drug approval process.

Now let me turn to the generic drug investigation. The allegations in that area are very serious and a matter of great concern to all responsible pharmaceutical manufacturers. They are of two types: first, that certain generic drug manufacturers actually falsified or misrepresented data in submissions to the FDA. That is serious misconduct. But it is also conduct that clearly eliminates any protection against punitive damages under this bill.

The second kind of conduct is bribery and payment of gratuities. Some individuals have pleaded guilty to such charges. But I know of no charge that any FDA official was induced by any gratuity to approve a drug that did not meet the statutory approval criteria. Nevertheless, when this committee reported the language of section 303(c) in 1986, neither you nor we had any inkling that the possibility of such conduct might exist. We believe that a minor modification to the wording of the language of section 303(c) would be appropriate to take care of the possibility that such conduct might occur in the future, and in my written statement I set forth that language.

Finally, a small note of irony. A representative of Consumers Union is to one side of me, and in his statement Dr. Wolfe associates himself with Consumers Union. Dr. Wolfe suggests in his statement that one must have some concern about the FDA and the integrity of the drug approval process because of the generic drug scandal.

The May 1990 issue of Consumers Union's magazine Consumer Reports, which I get at home and which I find very reliable, has an article called "Generic Drugs: Still Safe?" It is a detailed and good discussion, I think, but the sidebar on the first page sums it up. It says: "Scandal has tarred the generic drug industry and the FDA, but the drugs themselves have held up under scrutiny."

Well, they can't have it both ways. They cannot tell you that the scandal undermines our assurance that the FDA approval process protects the public and tell the readers of Consumer Reports the opposite.

Now let me move on to the examples cited by Dr. Wolfe. The only example that Dr. Wolfe cites in his prepared testimony that involves a prescription drug, which is what our members make, is Zomax, and I will turn to that first.

Before turning to that, let me make a general point that is relevant to all the examples. Remember that we are only talking about punitive damages here, a defense to punitive damages, not compensatory damages. The question, therefore, is not whether Dr. Wolfe offers evidence of mistakes or misjudgments by the FDA. When this committee reported the language of section 303(c) in 1986, it specifically noted that FDA might occasionally make mistakes. The question is whether FDA has sanctioned the kind of egregious misbehavior that warrants the extraordinary remedy of punitive damages.

Now let us turn to Zomax. First of all, what is the issue there? The drug was associated with anaphylactoid allergic reactions, the same kind of reactions that penicillin, aspirin and most of the other drugs in the class to which Zomax belongs are associated with. So far as I know, there is no allegation that anyone withheld any information from the FDA.

There is also no dispute, or at least there cannot be because the facts are clear, that physicians were warned in labeling and in letters sent to all doctors in the country that there was a potential for the drug to cause anaphylactoid reactions. The question is whether that warning was strong enough and whether it was delivered the way Dr. Wolfe would like it to be delivered.

Now the FDA, in testimony by the commissioner and in other submissions to Congressional committees in 1983 and 1984, said that when it reviewed the data at critical points during the marketing of that drug, it did not think that the incidence of those adverse reactions was sufficiently out of line to warrant the kind of action that Dr. Wolfe suggests. FDA might have been wrong. Dr. Wolfe might be right. I am not a doctor; I do not know.

One thing I do know is that this is an issue as to which reasonable people can differ. It is not a matter that warrants punitive damages. Perhaps that is why out of all the Zomax cases, a number of which were litigated and in some of which punitive damages were sought, no jury awarded punitive damages. I simply do not understand Dr. Wolfe's point about Zomax from what I know about the facts.

Now I move into areas that are not specifically within the purview of the trade association I represent, matters involving a medical device and a nonprescription drug, but I would like to speak very briefly about them.

The Bjork-Shiley heart valve was a medical device. My knowledge of that device is confined entirely to newspaper articles and public materials that I have been able to read. From them, my conclusion is that there was an unfolding evaluation of the risks and benefits of that product conducted by FDA and the manufacturer. The manufacturer and FDA at key points in the decisionmaking process thought that the device offered an advantage over other heart valves in preventing blood clots. They also recognized increasing evidence that there was a possibility that it could fail.

Any prosthetic device, indeed anything made by man, can fail. The question was whether the risks to the patients outweighed the benefits. Again, I cannot tell you whether the risk-benefit judgments made at various points in time were correct. Dr. Wolfe may be right; the FDA and the manufacturer may be wrong. I simply do not see the evidence of egregious misbehavior that he describes.

Finally, aspirin and Reye's Syndrome. Aspirin, at least in the context to which Dr. Wolfe refers, is a nonprescription drug. It is not subject to the same regulatory system as prescription drugs. It is subject to a system under which the FDA has been very painstakingly reviewing all available data, working toward the issuance of comprehensive rules governing particular nonprescription drugs.

Because of the thoroughness of that review, the rules with respect to aspirin are not in final form, nor were they in final form when the Reye's Syndrome issue arose. Under this bill as I understand it, there must be final rules for there to be a defense for nonprescription drugs. So the simple answer is, there would be no defense under this bill.

Now quite frankly, the Reye's Syndrome issue was also a lot more complicated than Dr. Wolfe suggests. Again, he may be right; the manufacturers and FDA may be wrong. But there was a legitimate controversy concerning a drug that had been used safely for 90 years. It seems to me reasonable for people to look at the data for a while before deciding whether such a drug was associated with a risk that had never previously been recognized.

Thank you very much.

[The statement follows:]

Statement of Richard F. Kingham
on behalf of the
Pharmaceutical Manufacturers Association
before the
Committee on Commerce, Science, and Transportation
United States Senate
May 10, 1990

My name is Richard F. Kingham. I am a partner in the law firm of Covington & Burling, where I have practiced in the area of food and drug law for more than sixteen years. During this time, I have represented clients in numerous proceedings involving pharmaceuticals before the Food and Drug Administration and other federal agencies. I also have advised clients with respect to product liability actions and the relationship between tort liability and the FDA drug approval process.

My statement addresses the defense to punitive damages for manufacturers and sellers of drugs and medical devices that is set forth in subsection 303(c)(1) of S.1400. This defense would protect against the imposition of excessive, standardless punitive damage judgments, which are a significant obstacle to continued pharmaceutical research and development. The Pharmaceutical Manufacturers Association, which represents more than 100 research-intensive companies engaged in the discovery and development of prescription pharmaceutical products, strongly supports this provision of the bill.

All Americans benefit from the discovery and availability of new medicines. S.1400 would permit manufacturers to increase the pace of pharmaceutical innovation without the fear of retrospective punitive damage judgments for conduct that complies with the detailed requirements set forth in federal drug safety laws and regulations. At the same time, this limited defense would not prevent full compensation from being awarded to injured persons in any case, or punitive damages from being imposed in a case where the defendant has violated its obligations under federal law governing the marketing of drugs.

Pharmaceutical Research and Development

Pharmaceutical therapies have saved countless lives and have improved the quality of life of millions of Americans. For example, vaccines have eradicated smallpox and have reduced the incidence of childhood diseases such as diphtheria and polio by more than 99 percent. Cardiovascular drugs have helped to reduce the incidence of death from hypertensive heart disease by more than 75 percent between 1960 and 1986. During the same period, pharmaceuticals have contributed to a decline of more than 80 percent in the incidence of death from kidney infections and more than 55 percent in the incidence of death from ulcers. Life expectancy has increased from 54 years in 1920 to 75 years today.

Drugs also are the most cost-effective component of our nation's health-care system, accounting for only six percent of health expenditures. For example, outpatient drug treatment for coronary heart disease costs approximately $1,000 per year, which can prevent the need for bypass surgery costing more than $30,000. Similarly, use of antibiotics can save thousands of dollars per patient by preventing serious infections and associated treatment costs.

New medicines will be made available, however, only through industry's continued commitment to investing the resources necessary to discover and develop them.

The United States pharmaceutical industry annually invests more than $7 billion in research and development. This private investment, representing 16 percent of sales, is greater than the annual expenditures on health research by the National Institutes of Health. Industry research efforts are the source of more than 90 percent of the most-prescribed drugs in the United States.

Innovation in drug therapy is a complex, time-consuming, and costly process. It takes an average of twelve years from the time that a drug is discovered until it is approved by FDA. The average cost of discovering and developing a single new drug is more than $200 million. Only one out of every 10,000 tested compounds ultimately is approved for marketing.

Adverse Effects of Punitive Damage Awards

The continued availability of important medicines, as well as industry's commitment to discovering new drugs, are threatened by standardless and excessive punitive damage awards. There is documented evidence that liability concerns in general, and particularly concerns about punitive damages, have caused manufacturers to withdraw beneficial drugs from the market and to reduce research and development activities that could yield important new drugs.

This evidence is discussed in a Supreme Court amicus brief filed last year by the Pharmaceutical Manufacturers Association and the American Medical Association in Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989). A copy of that brief is attached to this statement for inclusion in the record of this hearing.

In her separate opinion in Browning-Ferris, Justice O'Connor observed that the "threat of * * * enormous [punitive damage] awards has had a detrimental effect on the research and development of new products," specifically including "prescription drugs" (id. at 2924). This observation is supported by the amicus brief, which documents the decline in research and development activities in areas such as vaccines, contraceptives and drugs for pregnant women, which have been particularly vulnerable to punitive damage awards. In one case, punitive damages of $2.75 million were awarded for kidney damage alleged to have been caused by an oral contraceptive, even though the FDA had expressly refused to approve the addition of a warning, and the defendant could have been in violation of federal law if it had ignored the agency's decision. See Wooderson v. Ortho Pharmaceutical Co., 235 Kan. 387, 681 P.2d 1038, cert. denied, 469 U.S. 965 (1984). Similarly, Bendectin, an important anti-nausea medication for pregnant women was withdrawn from the market following numerous lawsuits despite the "nearly universal scientific consensus" that the drug does not cause birth defects. Richardson v. Richardson-Merrell, Inc., 649 F. Supp. 799, 803 (D.D.C. 1986), aff'd, 857 F.2d 823 (D.C. Cir. 1988), cert. denied, 110 S. Ct. 218 (1989). I respectfully refer the Committee to the brief for a more detailed analysis of the adverse effects of punitive damages on pharmaceutical innovation and product availability.

Studies published since the brief was filed confirm that punitive damages remain a significant obstacle to pharmaceutical research and development. For example, the Institute of Medicine recently published a study entitled "Developing New Contraceptives: Obstacles and Opportunities." This study concludes that product liability concerns "have contributed significantly to the climate of disincentives for the development of contraceptive products" (page 141). The IOM further emphasizes the failure of the courts to give sufficient weight to "evidence of compliance with FDA regulations" (id.). The same adverse effects on research, development, and product availability have been observed with respect to vaccines and other drug products as well.

The Need for Federal Legislation

The pharmaceutical industry is particularly vulnerable to inappropriate punitive damage awards because its products inevitably may cause harm to some persons. As pharmacologically active compounds, all drugs have the potential for causing injury. For example, approximately 300 persons die each year from anaphylactic reactions to penicillin, a rate of approximately 0.001 percent. Drugs are therefore recognized as "unavoidably unsafe" products that must be subject to special rules of tort liability.

At the same time, the comprehensive regulatory oversight of pharmaceutical products ensures that new drugs are marketed only after an expert determination that their benefits outweigh their risks. There is no justification for permitting a lay jury to second-guess this judgment and to impose punitive damages for conduct that complied with the Federal Food, Drug, and Cosmetic Act and with FDA's regulations.

Punitive damages should be reserved for egregious conduct that shocks the conscience of the community. They have no place in cases involving perfectly lawful conduct, in which a manufacturer submits full documentation of a drug's safety and effectiveness to FDA and markets its drug only following FDA's independent determination that the drug should in fact be made available to patients. Retrospective penalties for such lawful conduct not only have no justification, they have no cognizable benefits. They result only in the unavailability of drug therapies to persons who need them.

Provisions of S.1400

The pharmaceutical government standards defense before this Committee is a narrow one. It applies only to punitive damages. The full range of compensatory damages, including substantial awards for pain and suffering, would be unaffected by section 303(c)(1). No injured person will go uncompensated or will receive less than complete compensation as a result of this provision.

The defense is limited, moreover, to cases in which the defendant complied in all relevant respects with its obligations under federal law and regulations to report adverse events and other information to FDA. The defense recognizes that such compliance cannot constitute the sort of egregious misconduct that would justify punitive damages. Where the defendant has not met its obligations, it could not take advantage of the defense.

For the reasons stated, we support the principles set forth in this provision of the bill. I would suggest, however, that the punitive damages defense might be sharpened in certain technical respects to conform more closely to the Committee's intent as I understand it.

First, the exception to the defense should encompass the illegal gratuities uncovered by recent investigations of FDA. The exception in its current form already would cover any case in which false data have been submitted to FDA. Moreover, I am not aware of any evidence from the investigation suggesting that illegal payments induced FDA officials to approve drugs that had not been found to satisfy the statutory approval requirements. Nevertheless, the legislation should provide that, where a manufacturer has made illegal payments to government officials or engaged in similar illegal conduct for the purpose of securing approval of a drug, it should not be entitled in product liability actions to a defense based on FDA approval of that drug.

Second, the exception should be clarified to ensure that it applies only to withholding of information required to be submitted under federal law. FDA's regulations specify in detail the information and reports that it requires in order to make an informed decision whether to approve a new drug. The agency also has made clear, however, that it must "limit the scope of required reports" because too many reports "would make it more difficult for FDA to decide on a course of action, and would tend to clog up the system with useless information." 50 Fed. Reg. 7452, 7473-7474 (Feb. 22, 1985). Thus, in every case, the manufacturer -- at FDA's direction --

literally "withholds" information from the agency. The exception would swallow the rule unless it applies only when the manufacturer withheld information that it was required to submit under the applicable statute and regulations. The punitive damages provisions in the federal vaccine law and in state laws are drafted to take account of this issue, and I urge that S.1400 be modified along the same lines.

Third, the provision should not deprive pharmaceutical manufacturers of a defense on the grounds that the manufacturer failed to provide information to any federal agency other than FDA. Only the FDA has the specific authority to regulate the approval and marketing of pharmaceutical and biological products, and any federal government standards defense should recognize this.

Finally, the manufacturer should not be deprived of the government standards defense unless the information withheld relates to the plaintiff's harm. This is consistent with well-established principles of causation.

Conclusion

The punitive damages defense for pharmaceutical products in section 303(c)(1) of S.1400 would benefit all Americans by encouraging pharmaceutical innovation and contributing to the availability of important medicines. On behalf of the Pharmaceutical Manufacturers Association, I urge the Committee to act favorably on this provision of the bill.

Senator **Bryan**. Thank you very much, Mr. Kingham. We will hear next from you, Dr. Wolfe.

STATEMENT OF DR. SIDNEY M. WOLFE, DIRECTOR, PUBLIC CITIZEN HEALTH RESEARCH GROUP; ACCOMPANIED BY PAMELA GILBERT, LEGISLATIVE DIRECTOR, PUBLIC CITIZENS CONGRESS WATCH

Dr. **Wolfe**. Before going into an abbreviated version of the printed statement and a comment on Dick Kingham's testimony, I just want to make a couple preliminary points.

Over the 19 years since I started this group—by the way, I am accompanied by Pamela Gilbert, who is the Legislative Director of Public Citizens Congress Watch, our lobbying wing, and they have put out a report which we asked to be incorporated into the record called "The FDA Excuse" pharmaceutical firms want to blame the government when they place dangerous drugs and medical devices on the market.

Senator **Bryan**. That will be made a part of the record.[1]

Dr. **Wolfe**. I have talked with probably 200 or 300 victims of these various drugs or devices that are listed in the written testimony or the additional six that are listed in the FDA excuse report, and very common to these conversations is bewilderment on the part of the families of a dead child or a brain damaged child as to why when they walked into the drug store, for instance and the label said use aspirin for general relief of flu when there was clear evidence, clear enough for a government agency to issue a statement that it should not be used, aspirin should not be used for treating flu or chicken pox.

Similarly bewildered questions come from a 30-year-old woman whose husband died when his heart valve fractured when she found out that there was abundant evidence of the fractures, not quite the unfolding that Mr. Kingham likes to refer to. The inventor of the valve warned the company eight years ago, in 1982, that there were serious problems and that there was a safer alternative valve available which was soon put on the market in other countries. And so that from the victim's perspective, the issues they are raising are negligence.

And I think that in the context of this litigation—and the only section of it I am going to talk about, the immunity from punitive damages—I think that the mistake is that gross negligence or negligence of any sort by drug and device companies is perfectly compatible with and has co-existed for a long time with compliance with FDA laws and regulations. In other words, it is entirely possible for a company not to violate FDA laws or regulations, not to have withheld illegally any information and yet to be grossly negligence in the way in which they have tested the device and the way in which they have advertised it and the way in which they promoted it, and all of these apply in all of the examples that I will cite.

Another point in reference to one of the several parts of Mr. Kingham's testimony that I agree with is that, yes, there are drugs that are unavoidably unsafe, and the best example is the one he cited, penicillin. Unavoidably people who may never have had a previous adverse reaction to penicillin may get shock, anaphylaxis, and die. The labeling makes that quite clear. And if a doctor gives penicillin to someone he should have or she should have known, had a previous reaction, it is a malpractice case. It is not the fault of the company.

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[1] The report was not reproducible.

However, in the case of unavoidably unsafe it is entirely certain to have unavoidably unsafe products and yet not to have negligence such as in the case of penicillin. So that on one hand, this bill moves people to believe that as long as someone passes the government standard, abides by the laws and regulations that there is not any negligence. That just does not make any sense, and there are too many examples of it.

On the other hand, we should not believe that anyone would ever successfully sue a manufacturer of penicillin for negligence as long as the label had been accurate. They might sue the doctor for malpractice.

A further point is that the very laws and regulations that are "complied with" are often held up or distorted because of industry pressure. The best example of that is that not for eight years after the passage of the Medical Device Amendments in 1976 did the industry allow, reluctantly, a regulation requiring death reports to be made. In other words, if you were a company in 1980, 1982, 1983 and your medical devices failed, caused deaths or injuries, there was no Federal requirement to report these at all. And therefore, any slowness in getting these off the market, whatever it was, could not be blamed on a failure of compliance with the regulations.

So on one hand the industry held up the regulation. On the other hand they say we comply with it and, therefore, we should be immunized. It just does not make any sense. In fact, there is currently a battle beginning over whether hospitals should be required to report deaths and injuries. Right now, only the company is required to report them if they know about them. Since of the device deaths and injuries, many of them happen in hospitals, hospitals would, I think, be well to put under some reporting requirement. The industry is opposed to that.

And finally, just by way of discussing how the industry can impact the way in which laws and regulations are enforced and, therefore, have it both ways, in the last few years there has been an unprecedented speed-up at the end of the year of drug approvals whereas during 1985 and 1988 60 percent of the drugs approved on the average in each of those years were approved in one month, in the month of December.

Now, to do that is to invite problems, and at least a couple of these drugs have already turned into serious problems. One of them had to be taken off the market, and I do not think it is unrelated to the speed-up.

I just want to now just spend a couple minute going over a few highlights from the testimony.

Senator **Danforth**. Mr. Chairman, I am sorry to interrupt again, but I wonder during the balance of Dr. Wolfe's testimony if we might get a copy of Ms. Lipsen's testimony as given and have it Xeroxed so that some of us can look at it during the questioning.

Senator **Bryan**. I have no objection. I do not know whether that can be done mechanically or not.

Ms. **Lipsen**. There are a lot of annotations and arrows.

Senator **Danforth**. Well, you read your testimony, Ms. Lipsen. Could we have a few minutes to look at it?

Ms. **Lipsen**. You can have as long as you would like. It is just that I do not know if you would be able to read it.

Senator **Kasten**. We can try it with the arrows, Mr. Chairman, and obviously her testimony is going to be put in the transcript later, but I would like that also because there were some things that were said that I was not able to follow.

Senator **Bryan** Well, Ms. Lipsen certainly is going to be available for any questions you might have about any part of her testimony. Dr. Wolfe, I am sorry for the interruption again.

Dr. **Wolfe**. That is okay. We are used to interruptions.

Section 303(c), as alluded to in my testimony, would shield from punitive damages, from punitive damage liability, all drugs and medical devices that have received pre-market approval or that have been generally recognized as safe under FDA rules unless the manufacturer withheld from or misrepresented to the Federal Government information that is material and relevant to the performance of the drug or device.

In that regard, although it was not a new drug and did not go through new drug approval process, aspirin has been generally recognized as safe. The over-the-counter review that Mr. Kingham referred to is going on, but until it is completed, it gets treated as a generally recognized safe drug and, therefore, if the company were sued for punitive damages under this S. 1400 they would be immune, in our view.

He also alluded to the idea that we said, the FDA has minimal standards of protection. I will read what I actually said since he read the same testimony that I am about to read. Even at their very best, government safety standards are designed to establish a minimum level of protection for the public. At their worst, government standards may be outdated, underprotective or the result of political compromises that do not even suffice as minimum boundaries for safety.

In any case, government standards cannot address every area in which a manufacturer may engage in behavior that disregards the public's welfare such as in their marketing and advertising practices. The law recognizes this and holds manufacturers responsible for unreasonable dangers in their products, even when they comply with government regulations.

And, again, another point that I agree with Mr. Kingham is that we cannot do an infinite amount of testing before a drug or device is approved. There are going to be some surprises that occur after it is marketed, and the question is not whether there are going to be surprises like that, but how promptly and how responsibly are the companies that produce and sell these drugs going to find out and tell the government about these deaths and injuries that could not have been predictable before.

In that context, the Zomax example shows negligence, even though compliance with Federal law and regulations, in informing people. A number of physicians, you might be interested in, testified at a congressional hearing on this product telling the Congress that they themselves had had serious life-threatening adverse reactions and yet, when they called the company, each was told it is the first time we have ever heard about this. Well, this may comply with FDA laws and regulations, but it is gross negligence, and I think that the reason why most of those cases were not adjudicated, but were settled, often for large amounts of money, is because the company correctly knew that they were negligent and that that would come out in a trial.

I just want to finish by just talking about a couple other issues. One, as mentioned by Mr. Kingham, there have been some cutbacks in resources and leadership at the FDA, not the least of which is Mr. Bush's attitude expressed to the drug industry in 1982 that the government should not be an adversary. It should be a partner with industry. And certainly a lot of the problems in the FDA, setting the soil for the generic drug scandals, I think, were due to this attitude of let us not regulate as hard, a significant decrease in enforcement activities and so forth.

The example cited other than the Zomax one, which I have already alluded to, is this heart valve, Bjork-Shiley heart valve, which has now killed an estimated 750 people worldwide, about half of them in the United States. We became aware of this in 1983, the year after its inventor complained about its being unnecessarily dangerous and eventually asked for it to be taken off the market in 1984.

What has become clear, partly because a former employee of the company who left over this issue provided us with a lot of internal company documents, is that there was level after level after level of negligence within the company, ranging from negligent training of welders—all the valves that have broken have broken at a welding site—to the failure to heed their own internal company review which said that the welding operation was out of control, a statement made in 1983, three years before it came off the market.

So I think that buried or not so buried amongst all of the documents we have seen—and I will be happy to provide Mr. Kingham with some of these documents because I cannot believe that he has seen them. I know him to be very honest, and I do not think he would make the statement that he did if he had seen these documents. He said that he relied on things in the press and so forth. A lot of these documents have never been discussed in the press. So, I would be glad to provide them, and I think he can make his own conclusions.

On the issue of the aspirin, we learned about this in 1982, months after a government agency, the Center for Disease Control, had said that children should not be given aspirin for treating chicken pox or flu. We petitioned and sued the government to put a warning label, turning that advice into a mandatory warning, and it was about to happen in 1982 when the aspirin industry ganged up on FDA via OMB and HHS, and the regulation was killed, and it was not to be for four years. During the four years close to 1,000 children died of Reye's syndrome and many more suffered brain damage. So that we have, again, compliance with FDA regulations. There was no regulation requiring a mandatory warning label. Children died and were injured, and yet the problem was the industry itself putting undue pressure on the agency not to put out a warning label, a mandatory warning, which it eventually did.

In conclusion, there is no principal basis nor is there a need to shield manufacturers from punitive damages. And, again, these punitive damages are, in my view, related to negligence. Punitive damages cannot or should not be and are rarely awarded when there is not some evidence of negligence. They should not be shielded just because they have complied with government standards. In other words, complying with government standards is compatible with negligence, and there are instance after instance, nine of which cited in our report to document that.

Moreover, history shows that the FDA does not have the resources, leadership or ability to ensure that all manufacturers who receive pre-market approval for their drugs or medical devices do not engage in unconscionable behavior that injures, maims or kills unsuspecting consumers.

I agree again with Mr. Kingham that our system of regulation is better than anywhere else in the world, but it is not and cannot be good enough that we can take the heat off the companies by shielding them from the damages they should pay out when they are negligent. Punitive damages play an invaluable role in keeping the marketplace safe by punishing and deterring the malevolent corporate behavior and by providing incentives to remove dangerous products from the market.

Government regulation was never meant to be a substitute for private responsibility. Rather, government standards are designed to work in tandem with the liability system forcing corporations to act responsibly to protect the public health and safety. We strongly urge you not to undercut this true public and private partnership by approving S. 1400 and its FDA excuse. Thank you.

[The statement follows:]

STATEMENT OF

SIDNEY M. WOLFE, M.D.
DIRECTOR, PUBLIC CITIZEN HEALTH RESEARCH GROUP

and

PAMELA GILBERT
LEGISLATIVE DIRECTOR, PUBLIC CITIZEN'S CONGRESS WATCH

Mr. Chairman and members of the subcommittee, I am Dr. Sidney Wolfe, director of the Public Citizen Health Research Group. The Health Research Group was founded by Ralph Nader and me in 1971 to oversee the FDA, the drug and medical device industries, and other aspects of our health care system. I am accompanied by Pamela Gilbert, legislative director of Public Citizen's Congress Watch, the lobbying arm of Public Citizen. We thank you for the invitation to appear today to express our strong opposition to the "FDA excuse" contained in S. 1400, the "Product Liability Reform Act." Before I begin my testimony, I would like to submit for the record a report, entitled "'The FDA Excuse': Pharmaceutical Firms Want to Blame the Government When they Place Dangerous Drugs and Medical Devices on the Market," that was released today by Public Citizen, U.S. PIRG, Consumers Union and the Consumer Federation of America.

GOVERNMENT STANDARDS AS A DEFENSE TO PUNITIVE LIABILITY

Section 303(c) of S. 1400 would shield from punitive damage liability all drugs and medical devices that have received premarket approval from the Food and Drug Administration (FDA), or that have been generally recognized as safe under FDA rules, unless the manufacturer "withheld from or misrepresented" to the federal government information that is "material and relevant to the performance" of the drug or device. For approximately 19 years, the Health Research Group has been watching the activities of the

FDA to make sure that the agency fulfills its mandate of protecting the public from unsafe and ineffective drugs and medical devices. During that time, we have filed over 50 petitions at the agency, and have been a catalyst for the recall, removal, or placement of stronger warnings on more than a dozen dangerous drugs and devices. Through this experience, I can say unequivocally that the FDA does not have, nor will it ever have, the resources, authority, ability or the commitment to be the only line of defense shielding consumers from reckless, life-threatening corporate behavior. Manufacturers themselves must be responsible for ensuring the safety of the products they sell, whether or not the government takes timely action to remove those products from the market.

Even at their very best, government safety standards are designed to establish a minimum level of protection for the public. At their worst, government standards may be outdated, underprotective, or the result of political compromises that do not even suffice as minimum boundaries for safety. In any case, government standards can not address every area in which a manufacturer may engage in behavior that disregards the public's welfare, such as in their marketing and advertising practices. The law recognizes this, and holds manufacturers responsible for unreasonable dangers in their products even when they comply with government regulations.

It is particularly inappropriate to use government standards as a defense to liability in light of the growing influence that the pharmaceutical industry has had over the regulatory process in the past decade. The industry has become increasingly effective at delaying, weakening and even eliminating regulations designed to improve the safety of their products. In a 1982 speech to the drug industry, then Vice-President Bush gave his stamp of approval to the growing industry influence over health and safety regulations. He stated, "I think we've started to see this philosophical shift, the end or the beginning of the end of this adversarial relationship. Government shouldn't be an adversary. It ought to be a partner."

When the drug industry has not succeeded in forming this "partnership" with the FDA by persuading the agency to water down safety regulations, the industry has taken its case to the Office of Management and Budget (OMB). Through private meetings and communications with OMB, which are not even required to be disclosed to the public, pharmaceutical firms have been able to weaken or delay regulatory actions that the FDA has determined are necessary to guard the public health. Incredibly, at the same time the industry strives to scale back health and safety regulation, they are seeking a protection from liability whenever they comply with those weakened rules.

Even in the absence of undue influence by special interests, FDA approval of drugs or medical devices is not, and was never intended to be, a guarantee of safety. Since most drugs are tested on only a few hundred people over a short period of time, it is impossible to discover all problems that may emerge when a drug is mass-marketed over a ten- or twenty- year period. Short-term clinical studies are simply not designed to detect every problem. For this reason, FDA requires manufacturers to report adverse effects and, in some cases, to continue studying the drug after approval. This procedure is intended to detect problems that were missed during the pre-approval testing. But even when the manufacturer complies with these reporting requirements, there are long time lags before the FDA acts on the information. During that time, if manufacturers believe there are serious safety problems with a drug or device, they must be responsible for taking it upon themselves to remedy those problems as quickly as possible.

The "FDA excuse" might even accord immunity to a host of medical devices for which a showing of safety and effectiveness has never been required. Many medical devices that were on the market prior to 1976 have not been subjected to testing to determine safety and efficacy. Similarly, devices that have been deemed to be "substantially equivalent" to these grandfathered devices have also not been adequately tested. These devices include many IUDs and pacemakers. Although these devices could be considered to have received pre-market approval for purposes of S. 1400, they have not been adequately reviewed by the FDA, making immunity from punitive liability particularly inappropriate.

CUTBACKS IN RESOURCES AND LEADERSHIP AT THE FDA

Like most health and safety agencies, over the past decade the FDA has lacked both the resources and the commitment to adequately enforce important health and safety laws.

During the 1980's, the FDA's staff and resources failed to keep pace with the upward pressures of inflation and increased societal demands, such as the AIDS crisis. In 1979, the FDA had a staff of approximately 8,000. In 1989, despite the passage of 24 laws increasing the agency's responsibilities, FDA staff, excluding those assigned to AIDS-related projects, fell by 1,000, a decrease of 12 percent of its workforce. In addition, the number of product seizures, injunctions and criminal prosecutions dropped from 582 in 1980 to 237 in 1988.[1] Furthermore, between 1980 and 1988, the number of field inspectors visiting drug companies declined from 972 to 836, despite a sharp increase in the total number of new firms.[2]

In its 1991 budget justification to the Congress, the FDA states that it has had to delay scheduled inspections of drug and device firms because of the need to handle emergencies, such as the Chilean fruit-tampering incident. The agency has also admitted to being faced with "explosions in the development of new and highly complicated biomedical technologies with a resulting increase in drug applications that involve more complex effectiveness and benefit/risk ratio decisions." Yet, the Bush Administration has requested an appropriation from Congress for fiscal year 1991 that is approximately $50 million less than the 1990 appropriation. An agency so confined by resource and leadership constraints simply can not be relied upon to be the only watchdog over one of the nation's largest and most powerful industries.

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[1] "A Guardian of U.S. Health is Failing Under Pressures," Philip J. Hilts, New York Times, December 4, 1989, page A1).

[2] "Generic Drugs: Still Safe?" Consumer Reports magazine, May, 1990, page 310.

MISCONDUCT WITHIN THE FDA

In the past year, three FDA chemists, three generic-drug-industry officials, and two generic-drug companies have been convicted of bribery in exchange for speeding up and ensuring the approval of certain generic drug products. In addition, the FDA recently discovered that some generic-drug firms obtained approval for their name-brand substitutes by submitting false data to the FDA. In some cases, the firms actually fraudulently submitted the brand-name version instead of the generic. Recent investigations into the FDA's regulation of generic drugs have resulted in the removal from the market of more than 100 generic products as well as criminal investigations and convictions.

Recent statutory changes aimed at speeding up the generic approval process, combined with loose internal procedures at the FDA and the "let's be partners with industry" philosophy of George Bush, allowed these improprieties to occur. Just as the public is discovering that lax procedures within the FDA have allowed such gross misconduct to go undetected for so long, it would be irresponsible to give the same agency the sole authority to police intransigent manufacturers.

THE FDA RECORD

The single best argument against conferring immunity from punishment on all products with FDA approval or review is the FDA's own record. I will review three specific case studies in which approved or "generally recognized as safe" drugs and medical devices caused death or serious injuries due to flaws in design or deficient warnings that the manufacturer knew would result in harm. These three products alone have killed over two thousand people and injured thousands more. The report which accompanies my testimony reviews seven additional products whose dangers were known, but nevertheless, which were allowed to remain on the market while hundreds of unsuspecting victims were killed or seriously injured.

Bjork-Shiley Heart Valve

This artificial heart valve, manufactured by Pfizer, Inc. and approved by the FDA in 1979, was removed from the market in 1986 after 190 valves had fractured, resulting in 123 deaths. During the time it was on the market, more than 86,000 valves were implanted worldwide, which have already caused 250 deaths from fractures, and which continue to cause approximately one additional death each month.

When Pfizer learned of strut fractures soon after the heart valves were on the market, it tried to keep the controversy hidden -- first, by writing the FDA and urging the agency "not to notify the public," and then by writing the device's developer Dr. Bjork to urge him "not to publish the data relative to strut fractures."

In 1981, reports of strut fractures began to mount. But Pfizer ignored warnings from its primary clinical investigator and its own engineering study of the phenomenal stresses exerted on the delicately-welded struts. In fact, Shiley increased its production of these valves from 250 a week to more than 800 a week in 1981.

In 1982, after Pfizer reported 19 strut fractures with its valves, and again in 1984 after 87 fractures had been reported, FDA did request that Pfizer voluntarily stop production until the fracture problem was corrected. But when Shiley refused, the FDA did not exercise its authority to seize dangerous products in order to force the company to comply. Therefore, Shiley was allowed to continue producing and selling the deadly devices.

Between 1979 and 1985, Pfizer instituted at least five major changes in the manufacturing, assembly, testing or quality control procedures it used. Pfizer recalled various sizes of the valve on six separate occasions during this period. However, many of the changes and accompanying recalls were taken by Pfizer without notifying the FDA before taking the actions. Because FDA regulations requiring notification of changes did not become final until 1986, Pfizer was not legally required to report these modifications to the FDA.

At the same time the company was working to solve the fracture problem, Pfizer continued to aggressively market the heart valve. Throughout the years the valve was on the market, Pfizer consistently provided incomplete and misleading information to doctors regarding the number of strut fractures and the severity of the problem. In 1984, for example, Pfizer advertised its valve as the "standard by which all other mechanical valves are meassured."

In 1984, when the FDA finally analyzed Pfizer's claim that its valve caused fewer blood clotting complications than other valves, the agency found that the evidence did not support this claim -- a claim that had been one of the very bases for the valve's pre-market approval.~ Instead of calling for the withdrawal of the device, the FDA simply asked Pfizer to submit evidence showing why its pre-market approval should not be withdrawn. Pfizer stalled for a year before submitting the requested data in September, 1986. Upon evaluating this data, FDA informed Pfizer it was going to consider withdrawing its approval of the heart valve. Shortly afterwards, Pfizer withdrew the product on its own. Tragically, this removal, which occurred five years after the FDA first began the evaluation of problems caused by strut fractures, has not meant an end to the fractures and deaths. The death toll continues to rise by one to three people every month.

While people were dying from these heart valves, Pfizer was earning huge profits -- estimates place the earnings from these devices at between $80 million and $120 million. With such huge profits, Pfizer could settle hundreds of heart valve lawsuits without feeling a drain on its profit margin. Without the threat of large punitive damage awards, a wealthy and successful corporation like Pfizer can simply factor into their cost of doing business the compensation to be paid to the hundreds, perhaps thousands, of people who will suffer serious injury or death from a heart valve fracture.

A congressional subcommittee recently completed an investigation of the Bjork-Shiley heart valve. The staff report written after the investigation concluded that this case "raises serious questions about the FDA's willingness and ability to fulfill its regulatory mandate to protect public health when faced with companies that profit from the manufacture and sale of medical devices."[3] Incredibly, on the heels of this scathing review of FDA's regulatory failure, S. 1400 would insulate manufacturers from court-ordered punishment simply because they had received FDA approval.

Zomax

The FDA approved the marketing of the drug Zomax by the McNeil drug company in 1980 for the relief of mild to moderately severe pain. Less than a year later, reports began to emerge that the drug carried an exceptionally high risk of unpredictable, life-threatening anaphylactoid or shock-like allergy reactions in patients with no prior history of allergy to it or any other drug.

In 1982, McNeil received its first report of a Zomax-associated death. McNeil responded by sending a letter to doctors pointing out the possibility of allergic reactions to Zomax. While the letter stated that allergic reactions "cannot be ruled out" for patients who had previously had mild reactions to Zomax or similar drugs, the letter failed to include a warning concerning individuals without a prior allergy history. Although McNeil had reported the adverse drug reactions to the FDA as required, the agency failed to review this information. Therefore, the FDA did not object to McNeil's decision to remove the more detailed warning about the risk to all prospective patients that the company had originally planned to include in the "Dear Doctor" letter.

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[3] The Bjork-Shiley Heat Valve: "Earn as You Learn," Shiley Inc.'s Breach of the Honor System and FDA's Failure in Medical Device Regulation, a staff report prepared for the use of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, February 1990.

Although McNeil was aware of the serious dangers associated with Zomax, the company continued an extraordinary marketing campaign aimed at earning enormous profits from the sales of the drug. McNeil called the massive sales campaign "Operation 111," and explained to sales representatives: "Now, if that sounds like war, well, in our world of selling, that's what it is." The "111" represented the $111 million sales targeted by McNeil. Salespeople were told not to focus on anaphylactic shock, and later were instructed not to even mention the side effects to doctors.

Almost a year later, McNeil finally withdrew Zomax from the market as a result of the increasing negative publicity surrounding reports of anaphylactic shock reactions occurring across the country. Before the withdrawal of Zomax in March 1983, McNeil had sold $100 million worth of the drug, 14 people had died, and more than 400 had suffered life-threatening allergic reactions, according to FDA estimates.

Under the "FDA excuse," McNeil could not be penalized for their myopic, profit-seeking behavior simply because Zomax had received pre-market FDA approval. Therefore, other manufacturers would be encouraged to do what McNeil did -- sell off their stocks of a dangerous drug before it is removed from the market. But despite McNeil's tremendous marketing effort, the company did finally withdraw Zomax from the market before the FDA ordered its removal. Passage of S. 1400 would remove an important incentive -- the threat of punitive damages -- for manufacturers to remove dangerous drugs from the market when the government fails to act.

Aspirin and Reye's Syndrome

Strong evidence links the use of aspirin to treat chicken pox and the flu to the development in children and teenagers of Reye's Syndrome -- a relatively rare, but often fatal, disease. Although regulations to require warning labels for aspirin were proposed in 1982, it was four years before those regulations were finally implemented. In those four years, approximately 3,000 children developed Reye's Syndrome, about 1,000 children died, and many of the surviving children suffered brain damage. If parents had simply known to use something other than aspirin to treat their child's flu or chicken pox, many of those deaths and injuries could have been prevented.

In 1980, the Centers for Disease Control (CDC) concluded that Reye's Syndrome is linked to aspirin use for chicken pox or flu. When the FDA did not act, the Health Research Group and the American Public Health Association petitioned the FDA to require warning labels on aspirin. When the FDA did not act on our petition, we sued the agency for failing to require a warning label.

Finally, in June, 1982, Health and Human Services Secretary Richard Schweiker announced that there was a strong association between the use of aspirin in children with flu or chicken pox and the development of Reye's Syndrome, and directed the FDA to require changes in the labeling of these products to advise against their use for these childhood diseases. The labeling effort was to be supplemented by an educational campaign aimed at medical personnel, pharmacists and parents.

Then, due to industry pressure, the OMB intervened. A top OMB official had held a secret meeting with several industry representatives, including the president of the Aspirin Foundation. As a result, the OMB waged the manufacturers' battle for them and pressured the FDA to withdraw the regulation. HHS withdrew the plans for aspirin warning labels only 5 1/2 months after Secretary Schweiker's mandate.

Instead, HHS announced that another study should be completed to clarify the relationship between aspirin and Reye's Syndrome. Two years later, in December, 1984, the results of this study confirmed the previous findings -- children with chicken pox or flu who are given aspirin are 12-25 times more likely to develop Reye's Syndrome than children with those diseases who are not given aspirin. Based on these findings, HHS Secretary Margaret Heckler asked aspirin-makers to voluntarily include a warning label.

Despite the agreement by most aspirin manufacturers to change the labels, labels recommending aspirin for flu symptoms contined. A 1985 survey of 53 drug stores in 31 states found no store with aspirin labels associating the use of aspirin with Reye's Syndrome.

Finally, in 1986, four years after Secretary Schweiker's original directive, the FDA issued temporary regulations requiring the warning label. This labeling requirement was made permanent in 1988. The "FDA excuse" would insulate from punishment manufacturers like these makers of aspirin who would not label their products, even when they knew this could result in thousands of deaths to children and injuries such as brain damage, simply because the FDA did not require such labeling.

We believe that the foregoing case studies, and those that are detailed in the report on the "FDA excuse," present irrefutable evidence that the FDA simply has been unable to prevent some manufacturers from placing greed over human life when marketing drugs and medical devices to the public. Punitive damage liability is necessary to punish such unconscionable corporate behavior, to provide a strong incentive to remove unsafe products from the market when their dangers become apparent, and to deter manufacturers from engaging in conduct that threatens the public health and safety.

PUNITIVE DAMAGES DO NOT POSE AN UNDUE BURDEN ON THE DRUG INDUSTRY

Although punitive damages play an invaluable role in keeping the marketplace safe and in punishing wrongdoers, they are awarded very infrequently, particularly in product liability cases. In the most complete study to-date examining trial court decisions from over thirty jurisdictions in 10 states from 1981-1985, punitive damage awards ranged from 0 percent of all reported verdicts in four sites to a high of 21.6 percent in Cobb County, Georgia. For two-thirds of the surveyed sites, the percentage of reported punitive damage verdicts was less than ten percent.[4]

Furthermore, in recent years the U.S. pharmaceutical industry has enjoyed record prosperity, which clearly indicates that the industry does not need special exemptions from product liability laws in order to compete both nationally and internationally. According to an August, 1988 article in Fortune Magazine, in 1987 the drug industry had a 39.8 percent increase in profits and a 19.7 percent increase in sales. A survey of the Pharmaceutical Manufacturers Association (PMA) the following year found that their members' sales had increased another 11 percent. Now, PMA is running a nationwide advertising campaign touting their world leadership in pharmaceutical development.

In addition, the sale of just one successful drug can earn extraordinary profits for a drug company. In 1988, four pharmaceutical companies sold drugs that each generated sales of $1 billion or more in that single year. With their exceptional profits, these companies and other prosperous drug firms hired the nation's leading medical researchers to develop new drugs and medical devices.[5] These facts certainly belie the notion that this industry is having difficulty developing new and profitable products to compete in the global marketplace.

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[4] Daniels, "Punitive Damages Storm on the Horizon?" Preliminary Report of the Punitive Damages Project Study, Am. Bar Foundation, Fellows Seminar, ABA Midyear Meeting, Baltimore, Maryland (Feb. 8, 1986).

CONCLUSION

There is no principled basis, nor is there a need, to shield manufacturers from punitive damages just because they have complied with government standards. Moreover, history shows that the FDA does not have the resources, leadership or ability to ensure that all manufacturers who receive pre-market approval for their drugs or medical devices do not engage in unconscionable behavior that injures, maims or kills unsuspecting consumers. Punitive damages play an invaluable role in keeping the marketplace safe by punishing and deterring malevolent corporate behavior, and by providing incentives to remove dangerous products from the market. Government regulation was never meant to be a substitute for private responsibility. Rather, government standards are designed to work in tandem with the liability system forcing corporations to act responsibly to protect the public health and safety. We strongly urge you not to undercut this true public and private partnership by approving S. 1400 and its "FDA excuse."

Thank you.

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[5] "Companies Search for the Next $1 Billion Drug," Gina Kolata, The New York Times, November 28, 1988.

Ms. GILBERT. Senator Bryan, I wonder if I might say something briefly?

Senator BRYAN. We want to give everybody an opportunity. We try to be generous of our time and the members do have questions.

Ms. GILBERT. Very brief. I just want to respond to Senator Danforth on behalf of the four organizations that Linda Lipsen represents.

There were basically four individuals who were in the last two to three weeks preparing three major documents for this hearing in addition to checking out anecdotes that have been presented over the course of the last few months. We do not have a roomful like this of people to help us. We have been working very diligently, very hard, through our weekends, because we wanted everything ready for today so it could be inserted in the record.

This FDA Excuse report was finished at approximately midnight last night. I mean, that is how we have been operating, and until everything is prepared we do not make it public until we are sure, and all the I's are dotted and the T's are crossed, and so there have not been bad motives here and we are sorry that it looks that way.

We have been working very hard and we thought that presenting it at the hearing today was not the end of it, but that there would be opportunity in the record, and perhaps at another hearing, to respond. It was not meant to catch people unawares.

Senator BRYAN. Could we yield now?

Senator KASTEN. If I could just make one comment, because I think what we have, people here at this table who, theoretically at least, are supposed to be independent. Pam Gilbert just said "we have been operating" in order to prepare today's statement. These are not independent groups. They have different names. They are not independent groups. They have worked together.

Dr. WOLFE. The report has all four groups' names on it because they worked together. The report you probably have seen by now on the nine case examples was jointly prepared by the four groups.

Senator KASTEN. I believe that we have before us one report by four groups and one report by you, sir. That is two different groups.

Dr. WOLFE. I know, but the report that made up——

Senator KASTEN. But the underlying——

Senator BRYAN. The chair is trying to accommodate everybody, and we certainly tried to hear all points of view. Let us terminate this colloquy. Senator McCain has joined us and has not had an opportunity to make an opening statement. Let me yield to him before the round of questions if he has an opening statement.

Senator MCCAIN. No thank you, Mr. Chairman. This is too much fun to interrupt.

Senator BRYAN. That will be noted, and the ranking member of the subcommittee, Senator Gorton, also has joined us.

Senator GORTON. I would join in the sentiments of Senator McCain.

Senator BRYAN. The chair for biological reasons is going to take a three minute recess before we reconvene.

[Recess]

Senator BRYAN. The subcommittee will reconvene. Senator Pressler has joined us. Let me give him the opportunity, if he cares to do so, to make an opening statement before we go to our round of questions.

Senator Pressler.

Senator **PRESSLER**. I look forward to hearing the witnesses.

Senator **BRYAN**. Thank you.

Senator **KASTEN**. Mr. Chairman, there have been a number of allegations raised here, a number of what I believe are mistruths. I wonder if, before we begin the questions, if you can put the witnesses under oath.

Senator **BRYAN**. Well, we have not done that previously. I do not intend to do that. We certainly have every opportunity to ask witnesses questions in the colloquy. That has not been the practice as long as I have been the subcommittee chairman, and I do not choose to do that now. Let us hear from the witnesses in the questions. Everybody will get a chance to ask questions and we will build the record.

Let me begin first, Professor Henderson, with you. Part of your testimony argues for the uniformity that this legislation would create, but if I understand it, if there are State laws, for example, that would preclude punitive damages, this would not establish a punitive damage standard in that State. Am I correct in that?

Mr. **HENDERSON**. I think you are correct.

Senator **BRYAN**. If there are States, for example, that have put a cap, or a limitation, on the amount of noneconomic damages which I believe some States have, that that, too, would not be made a uniform standard because this S. 1400 does not do that and that would also be true with respect to joint and several liability. There have been a number of States that have enacted various changes. Some would consider them reforms, some would consider them otherwise, and that, too, as I understand it, would not change.

Mr. **HENDERSON**. Yes, I think that is right.

Senator **BRYAN**. So there still is going to be, to some degree, a lack of uniformity, would you agree, even if S. 1400 is adopted and even in those areas that S. 1400 purports to preempt State law and to establish some relative uniform standards.

Mr. **HENDERSON**. Right.

Senator **BRYAN**. Let me ask you about the one question that I had mechanically in the bill, and that is the alternative dispute resolution procedure.

As I understood the legislation, if it were determined that there was bad faith on the part of the party who failed to accept that, there could be a cost assessment made against that party, and it is not clear to me—and maybe you can enlighten me—as to whether that is a procedure which occurs during the course of the discovery proceeding in an independent proceeding even before discovery begins, or prior to the filing of a note for the trial docket. This provision, I believe, is in the early part of this bill. I think it is probably section 202, if memory correctly serves me.

Mr. **HENDERSON**. Right. The settlement is 201.

Senator **BRYAN**. But the alternative dispute resolution procedure is 202. My question is what if the offeree refuses to proceed pursuant to such alternative dispute resolution and the court determines that such refusal was unreasonable and not in good faith? Now, those are not standards that are unknown to the law, but my question is mechanically, how does this work? If a plaintiff files suit and the defendant asks for an alternative dispute resolution, what occurs? Take me through that if you will, for a moment.

Mr. **Henderson**. Well, I want to confess—I am not under oath, but I think candor is in order.

Senator **Bryan**. I would hope that would always be the order.

Mr. **Henderson**. Of course. I quite agree. I am walking through it with you sort of for the first time, but it would seem to me that the language that you quoted, if the offeree refuses to proceed to such alternative and the court determines that such refusal was unreasonable and not in good faith, the court shall assess reasonable attorney's fees and costs, and then it goes on to suggest how those might be measured.

To have that determination occur, at least with respect to the measure of the liability, early in the proceeding, would seem to me awkward. It would be difficult to know what the reasonable attorney's fees or the costs might be. So I assume that the court would tell the attorneys that were not cooperating with respect to some alternative dispute, that the court was inclined to think this was unreasonable. But I would imagine that that might well be a ruling that would have to be deferred, in part at least, until the hearing in court had been undertaken to assess the fees and the costs.

But I would think for the pressures to be brought, a court might well be inclined at least to indicate to the parties the court was inclined to think that the refusal was unreasonable, and the hope here is that when unreasonable refusals occur, that the parties will be under pressure to reconsider and to perhaps take the claim elsewhere.

Senator **Bryan**. Does anybody else have a comment on that? I am still not totally satisfied how it works. I understand what the concept is, but I do not understand how it works. I am trying to understand at what point in the proceedings is the application of this section made, and at what point the court makes a determination. Prior to completion of discovery? Prior to the trial? Does anybody have a comment?

[No response]

Senator **Bryan**. Let me go to you, Miss Lipsen. You have obviously generated a good bit of controversy here this morning. Very briefly, without mentioning the names of the manufacturers, you are indicating that this asbestos product alternative in your view is not safe?

Ms. **Lipsen**. No. I am not an environmental toxicologist. What I am saying to you today is that there are major questions as to the safety of this product, and it has been bandied about as a safe product, and I thought the Committee should be aware that there are some questions about it.

Senator **Bryan**. Is the evidence divided? I mean, there are those who claim that it may be a carcinogenic, as you indicated from some source material that you had, and others who say look, those folks are just simply misguided. It is in fact a safe product and ought to be on the market.

Ms. **Lipsen**. As I understand it, Monsanto did a test involving intrapleural, which is in-the-lungs injection of this product, and it caused fibrosarcoma in rats. Now, there is another test that I believe is on-going, and I was hoping to get the results of that test before testifying to you today, and that involves inhalation—an inhalation study.

Now, according to the documents that I had in my possession, and according to Dr. Phil Landrigan at Mount Sinai, the implantation study that Monsanto did is a very good indicator of carcinogenicity, and in fact it is the same type of test used for crysotile, which is an asbestos product, and so as I understand it Monsanto is still undergoing inhalation tests, and I am not sure whether or not those results have been brought forward.

I did ask Dr. Landrigan, however, about this—whether or not the inhalation tests proved to be negative, would that mean that the product was safe—and he still said that he would have grave concerns because it compared to crysotile asbestos.

Senator **Bryan**. Thank you very much. I see my time has expired on the first round of questions. If there is a desire to go to a second round, I would defer now to Senator Rockefeller.

Senator **Rockefeller**. Thank you, Mr. Chairman.

Following up what Senator Danforth said. I just want to say, that I received, as did he, a letter from Ralph Nader, and I received it, I might say, in my State's press, in which he purports to be talking about S. 1400 and never refers to anything in S. 1400. He does not know S. 1400. He goes back to the old bromides that he has been so accustomed to—Ford Pinto and A. H. Robbins—both of which—as before, would be allowed full remedies under S. 1400. The point is that, he just has not looked at it. He does not care about it. He is just going back to the old knee-jerk stuff.

He ends up with a very interesting statement. He says, "Most important, why are you spending your time huddled in Washington with corporate lobbyists, many of whom finance your campaigns, gambling with the lives and safety of millions of people by taking away the existing rights of injured or sick people against the perpetrators of their harm,"" et cetera.

I find that deep and fundamentally offensive. I will make a somewhat obnoxious comment and apologize for it beforehand. But this letter actually is addressed to Senator Danforth. I do not have my copy with me. I would suggest that in terms of carrying on our lives and being able to afford our bills that Senator Danforth and I have far fewer problems than does Ralph Nader at raising money. In following up on that question I would like to ask you, Dr. Wolfe, and you, Miss Lipsen, whether or not the American Trial Lawyers Association gives any money to your organizations? Yes or no.

Dr. **Wolfe**. The American Trial Lawyers Association has never given any money to Public Citizen, which is our organization. We have clearinghouses where we provide technical information for individual trial lawyers and charge them what our costs are, but that has nothing to do with the American Trial Lawyers Association.

Ms. **Lipsen**. I work for "Consumer Reports Magazine" and we do not take a dime from anyone, other than our subscribers, so the answer is no.

Senator **Rockefeller**. I think the answer is not no, and I would ask that the committee staff do some research on this. "Forbes Magazine" last fall had a report on this in which a number of trial lawyers were quoted as giving individual contributions.

Dr. **Wolfe**. You said the American Trial Lawyers Association.

Senator **Rockefeller**. Then I will amend my remarks.

Ms. **Lipsen**. To "Consumer Reports"? We value our independence. We fought for our independence up to the Supreme Court. We certainly do not take money from manufacturers or trial lawyers. In fact, we are engaged in a knock-down drag-out fight with trial lawyers right now in California. We support automobile no-fault, they do not. So there are many issues upon which we disagree with trial lawyers.

[The following information was subsequently received for the record:]

Consumers
Union
Publisher of Consumer Reports

May 18, 1990

The Honorable John D. Rockefeller
Room 724 Hart Senate Office Building
Washington, D.C. 20510-4802

Dear Senator Rockefeller:

During the May 10, 1990 hearing before the Senate Commerce Committee, Consumer Subcommittee on S. 1400, the "Product Liability Reform Act," you inquired as to the source of Consumers Union's funding. For the record, and because we have worked with you on a number of consumer issues, we consider it essential that you have full and accurate information.

It is important to us that you and your colleagues understand that Consumers Union, founded in 1936, has never received any contribution from the Association of Trial Lawyers of America.

As you probably know, most of our revenue comes from the sale of subscriptions to Consumer Reports magazine, which now has about 4.5 million paid subscribers, and from the sale of other information for consumers. We also have a fundraising campaign to help in the development of our new testing and research facilities, and for general purposes.

We have very stringent guidelines to preserve our impartiality and to prevent any outside influence on us. These include prohibition of contributions in excess of $5000 from any individual, prohibition of contributions in any amount from any business interest, and prohibition of honoraria from any interest where a potential conflict of interest may exist.

Consumers Union accepts contributions from individuals acting in their own behalf. Our written materials for the solicitation of individual contributions purposefully omit any request for information concerning the donor's professional affiliation or occupation. We are not aware of any gift to Consumers Union made by persons known to be affiliated with any trial lawyer organization.

Consumers Union's policies are intended to avoid acceptance of money that would create a conflict of interest, a potential conflict, or the appearance of a conflict. In my opinion, a contribution from the ATLA or in its behalf would constitute a potential conflict of interest.

Consumers Union disagrees with you on the merits of S. 1400 because we believe this legislation is not in the best interest of consumers. Our conclusion is based on an independent analysis of the facts and the law, and is not the product of influence by any professional group, or by any individual.

Senator Rockefeller, Consumers Union has prized its reputation for impartiality, independence and integrity from the day we were born. It has been my particular duty to guard that reputation zealously, and the Consumers Union staff in Washington has done so as well. I felt pained that you challenged Linda Lipsen's statement that Consumers Union does not receive money from ATLA, and can only assume you were unaware of how Consumers Union operates, and of the distinctions among consumer organizations. For your information, I enclose a copy of the brochure describing our organization, and a recent issue of Consumers Reports, with the sections concerning our policies marked for your attention.

If you have any doubts about the contents of this letter, I would appreciate it if you would let me know. I would like to work with you on this issue until this slight to our reputation is cleared up. We would appreciate your including this letter in the hearing record.

I appreciate very much your attention to this matter and hope to hear from you.

Sincerely,

Rhoda H. Karpatkin

Rhoda Karpatkin
Executive Director

Senator ROCKEFELLER. What I would ask the committee staff to do is to explore this issues Mr. Chairman—and also explore whether or not it is true that in some of Mr. Nader's organizations they release, in fact, those who give contributions, or whether their contributions are in secret, and whether we have any idea who is making those contributions.

I am simply upset enough about the matter of personal integrity as to the dependence upon money that I would like to say that money has never been a major factor in my life, if I may say so. Ms. Lipsen.

Senator BRYAN. I guess that leaves some of us out.

I want to proclaim my integrity as well.

Dr. WOLFE. I would like to proclaim mine, but I also suggest that "Forbe's" magazine is capable of making mistakes. I had read that article in it, also, and there were several mistakes in it for which I do not know if they ran a retraction or correction, but Mr. Nader and others wrote to "Forbe's" magazine, and there was some information——

Senator ROCKEFELLER. I would appreciate the staff doing some work on that.

Dr. WOLFE. Believe it or not, "Forbe's" is a capitalist tool that can make mistakes.

Senator ROCKEFELLER. No doubt, and they probably belong to the Trilateral Commission.

Dr. WOLFE. Or, in your view, the American Trial Lawyers Association.

Senator ROCKEFELLER. No, I have an extremely good record on consumer issues, which makes—this whole thing rather interesting.

In fact, the Consumers Union that you represent, Ms. Lipsen. has just finished naming me one of the 15 Senators in their hall of fame as being proconsumer.

Ms. LIPSEN. Senator Rockefeller, not that we would not name you if we could, but we do not do that. That must have been Consumer Federation of America.

Senator ROCKEFELLER. I will take that.

Ms. Lipsen, you appear skeptical about the sort of so-called unpredictability problem. You do not seem to think it makes much difference. Let me quote from a March law review article written by two professors at the University of Houston. These two, incidentally, are on your side with respect to tort reform as opposed to my side.

They say, "a more pointed criticism of the tort system focuses on the court's inability to stabilize the law, thus producing uncertainty as to liability. Such shifting and confusing decisions leave defendants exposed to uncertain liability even when the case is ultimately resolved in what many would characterize as relatively pro defendant rule."

Why are you so untroubled by the question of unpredictability?

Ms. LIPSEN. I think we are really talking about the solution for unpredictability. You are never going to get predictable product liability law unless you remove the jury system. When you have 12 individuals who are evaluating facts and information—and we believe in that jury system—you are not going to get predictable results.

We are troubled because we think the manufacturers want predictability of outcome, not predictability under the law. That is why we are skeptical about this argument.

Senator **Rockefeller**. Okay. On this question of the zomax matter, the 300 people who died from penicillin, I am asking you because I was going to bring that same point up.

Philosophically, where are we in this country in terms of the search for the discovery of drugs to cure AIDS, for example, which the FDA has not even let through at this point?

I would agree, incidentally, Mr. Kingham, with your idea that where bribery is involved everything should be thrown out. We are talking here only about punitive damages, and in that case I think you would be right.

If there is a one in a million chance that somebody is going to get hurt by a drug, should we hold it back?

If there is a one in a million chance that somebody is going to get hurt by some new electronic device or something which has to do with how our Nation competes generally in this world? In your own philosophy, if there is a one in a million chance should we withhold the product? Should it not be approved by the FDA, let us say, or others?

Ms. **Lipsen**. Senator, we are not asking to live in a hermetically sealed universe. We expect that there will be risks out there.

We are saying to you we do not want to be exposed to unreasonable risk. A one in a million chance, no, we do not think that manufacturer would be liable.

Senator **Rockefeller**. What about 300 deaths from penicillin? That is an awful lot of deaths. Why would you not, according to your philosophy, take penicillin off the market?

Ms. **Lipsen**. Those products are unavoidably unsafe. They work because of their toxic properties, and there will be some adverse reactions. We have said that; we have always said that. Where there is no warning to vulnerable populations, that is where we really draw the line.

So believe me, we do not expect to never be exposed to any risk. It is the unreasonable risk which we are worried about.

Dr. **Wolfe**. Could I comment on that?

Senator **Bryan**. Dr. Wolfe, I would ask you to try to be brief because we have to go to a second round.

Dr. **Wolfe**. How about 20 seconds? Is that okay?

Simply, the point is that the penicillin example is a good one because there is no gross negligence involved; therefore, the company that makes it could never be sued, forgetting about this bill, and have punitive damages recovered even though the risk is one in 300,000 or even when risks are higher than that.

So it is not a matter of how big or small the risk is. It is whether the risk is there as a result of gross negligence. If the risk is there as a result of gross negligence, even if the FDA has approved it we think that someone should be able to sue for punitive damages. That is the issue.

Senator **Rockefeller**. Mr. Chairman, my time has expired. I will wait for the next round.

Senator **Bryan**. Thank you very much.

I will defer now to Senator Danforth.

Senator **Danforth**. Ms. Lipsen, in reviewing your written prepared statement which you delivered before this committee, comparing it with the written prepared statement you delivered pursuant to committee rules two days ago, there appears to be no relationship between the two. Would you agree?

Ms. **Lipsen**. Yes, that is right.

Senator **Danforth**. It is also true that there is no relationship between your prepared testimony and any legislation before us. Is that right?

Ms. **Lipsen**. No, that is not right. The manufacturers have claimed that if S. 1400 would pass, the certain products that I listed today would be on the market. So, therefore, there is a relationship, a direct relationship between this bill and those products.

Senator **Danforth**. All right. But the point of your testimony as delivered today was really to trash certain products and to trash certain businesses. Is that right?

Ms. **Lipsen**. I am sorry that you feel that way, Senator.

Senator **Danforth**. It is an unavoidable conclusion, is it not?

Ms. **Lipsen**. I wanted the committee to be informed. I would not have produced something that I could not have confirmed. You would not want me to submit testimony two days ago that I could not have confirmed all of the information that I brought here to you today. This seems a little bit like shoot the messenger.

I apologize for any surprise that you may have felt. I just hope that you will look at the evidence before you. I would like to have another hearing. Senator Hollings and others have said that there will be no more hearings. Senator Bryan said there will be no more hearings. This is the only way.

Senator **Danforth**. Ms. Lipsen, let me say that any witness who wants the committee to be informed, of course, should be commended, not criticized.

You said in answer to a question, I think, from Senator Bryan that there had been another study?

Ms. **Lipsen**. That is right.

Senator **Danforth**. By Monsanto. In fact, it is not even by Monsanto. It is by an independent committee, I am told. It is an inhalation study. Why did you not mention that in your direct testimony?

Ms. **Lipsen**. Because I do not know what the results are of that, and I expected that would come up.

Senator **Danforth**. Do you think the committee should be informed that there is more than one study?

Ms. **Lipsen**. Dr. Landrigen's letter which I submitted for the record states that even an inhalation study would not mean that the product was safe.

Senator **Danforth**. Why did you not tell us that there was more than one study?

Ms. **Lipsen**. Well, I had five minutes and a lot of products.

Senator **Danforth**. Do you think that fairness dictates that we should get the facts? If your desire as you purport it to be is to inform the committee, why should we not be informed that there was a second study?

Ms. **Lipsen**. In response to a question I was——

Senator **Danforth**. Why did you not tell us in direct testimony? Why did you give us just half the story?

Ms. **Lipsen**. I do not think it is half the story. The inhalation test, as far as I knew I was trying to track it down. The inhalation test, as far as I knew, was not completed. I had nothing to say about it.

Senator **Danforth**. There is an interim report, is there not, that is public knowledge?

Ms. **Lipsen**. An interim report as to what?

Senator **Danforth**. The inhalation study. It is public knowledge. At least the New York Times knew about it on Tuesday.

Ms. **Lipsen**. I do not know.

Senator **Danforth**. You do not know?

Ms. **Lipsen**. No.

Senator **Danforth**. Your careful investigation did not unearth that?

Ms. **Lipsen**. There is an inhalation study that is ongoing as to what those results are. I expected to hear back from the EPA as to what those results were.

Senator **Danforth**. You would never tell us there was such a study, would you?

Ms. **Lipsen**. I would tell you that there was a study, as I did in response to a question.

Senator **Danforth**. Tell me. The study that involves intrapleurally injected material, the chronic pleural implant study, the method which—and I am not a scientist but—as I understand is a mixing of whatever the substance that is being tested with a gel and a direct implantation in the tissue. Right?

Ms. **Lipsen**. I am not a scientist, either. I am not here to prove the safety of this product. All I am here to do is tell you that there are concerns about the safety of this product.

Senator **Danforth**. You are here to vouch for this testing method. At least you cite a doctor at a hospital in New York who says that it is an important method.

Why did you not tell us that this method has also been criticized? Why did you not tell us that, for example, the National Institute of Occupational Safety and Health has criticized this method and has said, in effect, that it is not necessarily probative of the carcinogenic properties of what is being tested?

Ms. **Lipsen**. Because I was not aware of that.

Senator **Danforth**. Do you think if your object is to inform the committee you should at least make an effort to find out whether or not this method upon which you are relying has been criticized?

Ms. **Lipsen**. The effort that I made to uncover these documents was long and hard. It was very difficult to even—I mean, I did not even know any documents existed. I went to three different offices. I got the runaround in several different offices. Finally I got something on microfiche that I could not even decode. So this was a long process.

The reason why we did not come forward with this earlier is because I was not sure that we had the complete material.

Senator **Danforth**. You still do not have the complete story, do you? What you told the committee was not the complete story.

Ms. LIPSEN. Senator, what that proves is that there is an issue about safety which I think this committee should be informed about. There is an issue. I cannot litigate the safety of this product as we sit here today. I do not think that is the role here.

I think there is an issue of safety.

Senator DANFORTH. So your job is to run around the country and appear before public forums and raise issues and not present the other side; correct? It is not your duty to protect the other side, and it is not your duty, as you understand it, to warn people what you are doing?

I mean, Monsanto has no scientists who are present today to defend themselves or to talk about the study. I might point out that this product has never been put on the market. It has not been marketed.

Ms. LIPSEN. That is right.

Senator DANFORTH. I would submit the reason it has not been marketed is because exactly what has happened today was predictable; namely, that people would come forward and trash it and file lawsuits, Nader organizations would wage attacks and so on.

You gave us no advance warning of this. You gave no one else advance warning. You submitted one form of written testimony on Tuesday. Your testimony today which was prepared and written out in advance——

Ms. LIPSEN. Last night.

Senator DANFORTH [continuing]. Was not given to the committee in advance, was it? You departed from your testimony. You went into an entirely different subject, and in doing so you did not even mention the fact that there was a second study, and you did not mention the fact that the study you rely on has been one that has been criticized by scientists. You did not do that, did you?

Your object was to trash somebody for a product that has never even gone on the market because that is the sensational way to oppose legislation, and anybody who is for this legislation, anybody who says anything favorable, anybody who supports it is going to be trashed. Senator Rockefeller is going to be trashed, Senator Pressler is going to be trashed, Monsanto Company is going to be trashed twice as a matter of fact. Searle, of course, is a Monsanto division which you attacked today. Anybody who raises a finger is going to have some public forum. Nader is going to go running around from airport to airport holding press conferences paid for by the trial lawyers, as Mr. Wolfe says his organization is paid for by the trial lawyers——

Dr. WOLFE. I did not say that. I would correct you, Senator. You made a mistake. You have misspoken.

Senator DANFORTH. You are talking for the economic interests of the trial lawyers. That is their mission——

Dr. WOLFE. You are lying, Senator. I resent your lying statement.

Senator BRYAN. The witness will refrain. Senator Danforth has asked a series of questions, made some statements. His time has expired in the first round. There will be one additional round of questions that will be made available.

Senator Kasten.

Senator KASTEN. Thank you, Mr. Chairman. Let me just make sure that we all understand each other. The question here is whether or not individual trial lawyers have at any time contributed to groups such as Public Citizens Congress Watch, U.S. Public Interest Research Group or other groups that are part of this overall Nader group.

Your answer to us a moment ago was that the Trial Lawyers Association probably has not or has not to your knowledge contributed to these organizations, but individual trial lawyers have and do contribute to these organizations. Is that correct?

Dr. **Wolfe**. My answer was that we have set up clearinghouses for attorneys involved in product liability litigation on the heart valve, for example, and people join the clearinghouse and pay a fee to get technical information. We operate the clearinghouses pretty much at cost. We also get contributions, I am sure, from defense attorneys, even from Members of Congress possibly. I do not know.

Senator **Kasten**. I do not want you to use up all of my time. I just want to be sure that you are speaking now——

Dr. **Wolfe**. For Public Citizen; for Public Citizen.

Senator **Kasten**. You are speaking now for Public Citizen or Public Citizen Health Research Group?

Dr. **Wolfe**. Same thing. Public Citizen Health Research Group is one of the groups in Public Citizen.

Senator **Kasten**. I understand.

Dr. **Wolfe**. The Public Citizen Health Research Group has the clearinghouses which we charge attorneys for.

Senator **Kasten**. Ms. Lipsen, you earlier said to Senator Danforth you decided to go forward with this testimony last night, and that is why you changed your testimony last night, and that is you were not able to provide us with the information. I would like to just bring your attention to two things from Dr. Landrigen. If you look at the letter that is before you, he wrote the letter on May 3rd, 1990. Today is the 10th of May, and in the last paragraph of his letter, and I will read it, "You may feel free to cite my letter in the testimony that I understand you will be giving next week."

Who asked Dr. Landrigen for this letter and when did you ask him for it?

Ms. **Lipsen**. I asked Dr. Landrigen for that letter, but I was not sure that I was going to present that testimony because I am not an environmental toxicologist. I wanted to be sure of the details of the studies to the best of my knowledge. And, yes, I mentioned to Dr. Landrigen and I wanted him to put that in the letter. I mentioned to Dr. Landrigen that I wanted to have—I wanted for him to memorialize what he thought about the test so that if I presented it in my testimony, I could use it.

I mentioned—I have told this committee that I had been thinking about doing it, but it was a matter of ferreting out the truth.

Senator **Kasten**. Do you know a "New York Times" reporter named Barry Meyer?

Ms. **Lipsen**. I think every consumer knows Barry Meyer.

Senator **Kasten**. How would Barry Meyer have received the packet of materials on Tuesday which you said you were not prepared to give to the committee until last night? That New York Times reporter had this packet of materials that you just gave us which you said you were not prepared to talk about until last night, on Tuesday. Why is it that you would give a New York

Times reporter or maybe some other reporters material that you not only would not share with the committee, but which you have told Senator Danforth you had prepared to go forward with until last night?

Ms. LIPSEN. The "New York Times" has not published anything, to my knowledge, on this. The "New York Times" has not published anything, to my knowledge.

Senator KASTEN. I think that is in large part because of a number of people rebutted some of the limited material that you had, and they tried to do what you were not trying to do here today, and that is to present a balanced point of view.

Ms. LIPSEN. This is public information. It just took the public a long time to find it.

Senator KASTEN. Did you or any individual from either Public Citizen Congress Watch, U.S. Public Interest Research Group or Public Citizen Health Research provide the "New York Times" reporter or any other reporter with the material that you provided to the committee here today before you provided it to the committee here today?

Ms. LIPSEN. No. I believe that the majority had copies of some of the documents.

Senator KASTEN. Did you or on behalf of any of the groups which I named in my previous question provide the "New York Times" reporter with this material before the committee had copies of this material? Did you provide the "New York Times" reporter with this material? Let us start there. Then we will worry about when.

Ms. LIPSEN. He had access to this material, yes.

Senator KASTEN. How did he have access to this material?

Ms. LIPSEN. It is public information and, yes, I spoke to that reporter, but he did not cover—he did not cover this story. He did not cover this story before you had a chance to look at this documentation.

Senator KASTEN. He is covering this story, and he called some of us on Tuesday and Wednesday of this week, and today is Thursday and, for one reason or another, you are unwilling or unable to do what he is doing—trying to get the whole story. The answer to my question is that you personally provided him with this material on what day? On what day did you meet with him?

Ms. LIPSEN. I have not met with him.

Senator KASTEN. On what day did you provide him with this material?

Ms. LIPSEN. I believe it was Sunday.

Senator KASTEN. Thank you, Mr. Chairman. My time has expired.

Senator BRYAN. Thank you very much, Senator Kasten. Senator McCain.

Senator MCCAIN. Mr. Chairman, I have only been in Congress now going on eight years. This is the first time at a hearing that I have seen a witness yell at a Senator that he is a liar. I am appalled at that behavior on the part of the witness, but it is more telling than that. It is a visible and outward symbol of the view and the attitude and the attacks that the Naderites have made on the integrity of members of Congress for which they have gotten considerable sums of money themselves.

I have had the privilege of knowing the Senator from Missouri for many years, Mr. Chairman. I do not have to review his credentials and his standards of integrity and conduct which he has signified his service to not only his state, but this nation, and here we have a witness, Ms. Lipsen says in turn we, speaking of her organization, have tried to present a balanced testimony about the facts rather than sensational anecdotes. That is preliminary.

Meanwhile, a letter arrives from her boss, a letter arrives from her boss that says most important—most important at the end of the letter. Why are you spending your time huddled in Washington with corporate lobbyists, many of whom finance your campaign, gambling with the lives and safety of millions of people, et cetera.

Mr. Chairman, does anyone on this committee believe that the Senator from Missouri or the other members of the Senate that have received this similar letter are trying to gamble with the lives of millions of American citizens? I suggest to you, Mr. Chairman, that this is an outrageous example of the activities of this organization which do not contribute anything to the legislative process.

Senator **Bryan**. If the Senator would yield. The document you make reference to, I think, is the same one that Senator Rockefeller quoted from.

Senator **McCain**. It is a letter from Mr. Nader dated May 4, 1990, The Honorable John Danforth, United States Senate.

Senator **Bryan**. I just thought the record should be clear. I acknowledge we all have a copy.

Senator **McCain**. You see, Mr. Chairman, we have a witness that comes before us and says we are going to give you balanced testimony. Meanwhile her boss——

Ms. **Lipsen**. No, that is not my boss.

Senator **McCain**. Sends a letter, Mr. Chairman. I do not wish to be interrupted by the witness.

Senator **Bryan**. The Senator may proceed.

Senator **McCain**. Nor by Dr. Wolfe. They come here and say they are going to give balanced testimony. Meanwhile, their boss launches a vicious personal attack on all the co-sponsors, but particularly the Senator from Missouri, impugning his integrity and his concern about the American people, "huddled with corporate lobbyists many of whom finance your campaigns."

Mr. Chairman, someday the American people are going to catch up with you people and someday they are going to find out that what you are doing is very harmful to the process. And if you attack and impugn the integrity and reputations long enough of people like Senator Danforth, it will be very difficult for this nation to function because the basis of our government rests on respect of the people for their elected representatives. And this letter from Mr. Nader goes a long way towards destroying the reputation of Senator Danforth and others that this letter was addressed to.

And, Mr. Chairman, I have no questions for the witnesses except one, and that I would request that you, Mr. Chairman, request from Dr. Wolfe the amount of money that defense attorneys and members of the American Trial Lawyers Association have contributed to his organization, and I hope that that would free and open and public access to that. Thank you, Mr. Chairman.

Senator **Bryan**. Dr. Wolfe, would you make that available for us.

Dr. WOLFE. I do not have the records.

Senator BRYAN. I appreciate that, but do you have any objection?

Dr. WOLFE. I would certainly ask the people who have the records whether it is possible to make that public.

Senator BRYAN. As long as you will try to comply with the Senator's request.

Dr. WOLFE. If it is possible, certainly.

Senator ROCKEFELLER. If the Senator from Arizona would just yield for a clarification, I think that the letter from Mr. Nader in no way goes even one inch in impugning the integrity of the Senator from Missouri. You indicated you felt——

Senator MCCAIN. That may not be the view of the Senator from Missouri.

Senator ROCKEFELLER. I am not talking about what people feel. It just does not mean a damn thing.

Senator DANFORTH. Mr. Chairman, the Senator from Missouri appreciates the well wishes of his well wishers more than he appreciates the ill wishes of his ill wishers.

Senator BRYAN. The Senator's statement will be made a part of the record.

Senator Gorton.

Senator GORTON. A question for the four of you beginning with Dr. Wolfe and perhaps simply working across the group of four. Dr. Wolfe, the State of Washington and somewhere between three and five other states have traditionally not permitted punitive damages in most forms of civil litigation. Do you—and, as I say, this question for each of you—have any indication that manufacturers or wholesalers or retailers located in the state of Washington or selling their goods in the state of Washington operate with a lower degree of due care or the opposite of that, more negligently than do their counterparts in states in which punitive damages are available?

Dr. WOLFE. I cannot fully answer the question, but I guess the main answer I would have is that drugs and devices, the main things that I know about that we are talking about here, are manufactured in one place with Federal standards and are sold the same in Washington as they would be in the 45 jurisdictions that do have punitive damages. And so I cannot imagine why the fact that there is a Washington, at least as far as the nationally distributed product would have, would make any difference. In other words, the company does not have a different standards for the state of Washington than it has for the other 45 states.

I mean, your question could be best answered only if we had some information from companies that sell different products in the state of Washington than elsewhere or Washington State-based company that, because of the punitive damage freedom, so to speak, are using a different standard. I just do not think there is any evidence like that.

I mean, nationally distributed products have the same label, the same standards wherever they are, whether or not the state has punitive damages.

Senator GORTON. Fair enough. Is your answer to the question then that there is no evidence that such companies, even if they are local Washington companies or companies in one of those other states operate with a lower standard of care than do companies that have headquarters in states with punitive damages?

Dr. **Wolfe**. I would just say there is no evidence either way that they operate with a lower, the same or possibly perversely a higher standard of care. I just do not think there is any evidence.

Senator **Gorton**. Well, is not your case for punitive damages based upon the proposition that it will heighten the degree of due care on the part of manufacturers?

Dr. **Wolfe**. Well, if the majority of states have punitive damages, as is the case, then the attitude of the company in testing, manufacturing, marketing, promoting and advertising a product will be based on what they face in most places, not what they face in one or two jurisdictions.

Senator **Gorton**. Mr. Kingham.

Mr. **Kingham**. Senator, I know of no evidence that there is a lower standard of care with respect to manufacturers or sellers of products in the state of Washington. I also know of no documented evidence that the threat of punitive damages has a significant effect on corporate behavior as the proponents of punitive damages suggest. As I point out in my prepared statement, I do know of instances in which the threat of punitive damages deters the development of safer products in the area of pharmaceutical research, having exactly the opposite effect that punitive damages are supposed to have.

Senator **Gorton**. Ms. Lipsen?

Ms. **Lipsen**. We actually find punitive damages have a salutary effect. We find that punitive damages are responsible for getting products like flammable fabrics off the market, Ford Pinto, Dalkon Shield, these kinds of products off the market.

Believe me, we do not think very many manufacturers are guilty of punitive damages. This is the most outrageous, egregious kind of conduct, but when it happens we think the courts should be allowed to do something about it, and we are not happy about the law in the state of Washington, but that is the law in the state of Washington.

Senator **Gorton**. Well, but my question was do you know of any evidence that companies which consider themselves primarily subject to laws like those of the state of Washington operate with a standard of less care than similar companies elsewhere? Do you know of any such evidence?

Ms. **Lipsen**. I have not seen any studies like that, no.

Senator **Gorton**. Professor Henderson?

Mr. **Henderson**. No, I have not either.

If I could just for—if I could indulge the committee for just maybe a minute, Senator Bryan asked me a question about the bill, and it may be the only question in this hearing about the bill. And so I cannot let it go. It has been a fascinating——

Senator **Bryan**. Strange it would occur.

Mr. **Henderson**. It is very odd.

Senator **Gorton**. I thought my question was on the bill.

Mr. **Henderson**. It was, yes. I am now firm in my judgment, sir, that the provision that you pointed to, section 202, anticipates waiting until well into the proceedings since subsection (c) creates a rebuttable presumption of bad faith when a verdict is rendered in favor of the offeror, and I think that that would, perforce, have to await trial.

Let me just say quickly that I am struck reading the prepared statement that Ms. Lipsen made available to me prior to this moment that with the tendency on the part of the opponents of this bill to ignore what the bill says and the impact of the bill on hypothetical cases. With no attempt to trash anything, I do think her statement is replete with examples that miss the point, sometimes rather drastically.

I have some notes from last night. The examples that she advances with regard to punitives—and this was echoed in Dr. Wolfe's testimony today—seem to be, without going into great detail—I will simply go on the record with my judgment—that they would receive a very bad mark in a law school seminar hoping to address the adequacy of the bill and what it would do since most of the references are to points that completely miss what the bill is trying to do.

My overall impression is that the opponents either have not read this thing or refuse to take it seriously and are dealing in that syllogism that I described to you, and I do believe it is in large part a kind of knee-jerk notion. Most of the cases that we have been talking about simply would not be affected in any negative way by the bill, and that seems to be lost on the people opposing this.

Senator **Bryan**. Senator Pressler?

Senator **Pressler**. Thank you very much, Mr. Chairman. Let me just comment briefly on some of the things that have been said.

Several years ago I was working on some of this legislation and all of a sudden a foundation appeared in my State for consumers. It sharply attacked me and had some press conferences. They were asked questions about if they had anything to do with the trial lawyers and they said no, they were just financed by people interested in safety.

Later a newspaper reporter on a tip called a law firm and learned that one law firm had contributed $50,000 to this particular foundation. That foundation made very sharp personal attacks on me in the State, and if it were not for that accidental disclosure, which is not required, people would have been told that this is just an innocent group that represents consumers.

I find it very strange in elections—I was reading an article in "The Wall Street Journal" that one senator who reportedly opposes this type of legislation raised $88,000 in one or two nights with trial lawyers, while it pointed out that somebody who supports it had been criticized for getting $8,000 from the other side.

There are a number of these foundations that spring up in my state, and were having a drought now. But it always amazes me how these foundations spring up out on the prairie without any apparent support, to give public information out and supposedly do the public good.

I also find it passing strange in my own campaign—I did not think I was known outside of little old Minnehaha County, but my opponents, FEC reports, suddenly have trial lawyers from all over the United States in it. If I ever need a lawyer I will just refer to his reports in the various states.

But the point is, in listening to Dr. Wolfe, all of this is very innocent. I am not saying there is anything illegal being done, but I think we should say who we are and admit to where some of this money is coming from.

Now, in my own State we have rumors of independent expenditures by trial lawyers, not necessarily by the Trial Lawyers Association but by other foundations formed. Several distinguished members of the bar in my State have written a letter—a public letter—criticizing the behavior of trial lawyers in these particular activities, and coming very strongly to my defense.

But I find this whole discussion this morning very depressing, because I think that these foundations, the sharp personal attacks that they make, claiming they have nothing to do with trial lawyers. Yet, if we were able to dig into—and of course we cannot, because the lists are secret, I guess.

Dr. Wolfe, I would just like to ask you again, could you provide us with a list of the people who contribute to your particular organization?

Dr. **Wolfe**. If it is possible. I mean, a number of people contribute anonymously. I mean, the point I guess, which I did not get across, we are aware of a number of attorneys who buy services from us and some of them are—a lot of them are plaintiffs' attorneys. We have these technical clearinghouses and we sell them information for what it costs us. I mean, that is the main place. You would see these things showing up.

There are physicians, there are lawyers, there are business people who pay $35 a year to become members. I mean, virtually all of the support of Public Citizen, which I guess you—there is no reason you should know that—is from membership. Membership—average membership, $35. Like any other membership kind of organization, only a tiny fraction comes from foundations, medical foundations. I mean, that is not a very big part of our income.

Senator **Pressler**. Do you have members in addition to contributors? Usually, if you dig around in these things, you find—these groups say well, our foundation, the League of Rural Voters, is just made up of farmers on the drought-stricken prairie.

Dr. **Wolfe**. We can provide you with the evidence as to what percentage are these $35 contributors. That is the typical contributor to our organization. We have very few large contributors from anywhere, whether it is trial attorneys or doctors or anyone else.

Senator **Pressler**. Well, if we could find out who they are and what their profession is, that would certainly help us a lot.

Dr. **Wolfe**. We may not know what their profession is. I mean, if someone gives us $35 and it has their name down, they might be a trial attorney, they may be a defense attorney, they might be a Member of Congress. We do not know what their profession is, necessarily, by just their giving us $35.

Senator **Rockefeller**. Would the senator yield?

Senator **Pressler**. Yes.

Senator **Rockefeller**. Are you aware of whether or not—or could you check the records to see if the records are available, whether you receive any money from the Rockefeller family fund? I think you do.

Dr. **Wolfe**. All of the foundation money together makes up, I think, something like 3 or 4 percent of our budget. All I am saying is that that is not a very large amount of our budget—the Public Citizen overall budget. We do get some money from that, but it is a tiny, tiny fraction, with all the other foundation money, of our operating budget.

Most people, including the trial lawyers, do not want to support us because we disagree with a lot of people. We disagree with drug companies, we disagree with defense attorneys, we strongly disagree, as Miss Lipsen pointed out, with a lot of things that the American Trial Lawyers Association and individual trial lawyers do, and so we mainly have to depend on very small contributions. We get very, very little large money from anyone, and that is likely to stay that way, because when we say things as they are, it sometimes offends people.

Senator **Pressler**. You know, what you are saying is almost the same thing that the Committee for Public Safety, or whatever they were, said at the Sioux Falls Airport.

Dr. **Wolfe**. I do not know about that Committee.

Senator **Pressler**. I could give you some very interesting clippings, and just by accident the paper found out that they were not all just little old folks giving $35. There was one contribution of $50,000 from a trial lawyer's firm.

Dr. **Wolfe**. We do not get money like that at all from anybody, and so they are very different from ourselves.

Senator **Pressler**. Then you are a very clean, public servant type, and I hope you make public your records, given this exchange that has occurred here today, in which you referred to a senator as a liar and so forth. Certainly a man of your integrity and standing should want to make a full disclosure, and so we look forward to reading that.

Now, let me ask a couple of questions on the bill, and before doing that, let me say it is a mystery to me, with all of these $35 being contributed, all of these things happening, the Trial Lawyers Association not doing anything. I see third party expenditures by the Trial Lawyers Association in campaigns. I see $88,000 in one night raised for—according to "The Wall Street Journal," for one senator.

I see foundations springing up. I see distinguished members of the bar so upset with some of the practices that they come to the defense of someone such as me without my even asking them. I think there is more going on here than we realize, and I think we need to know, and it is too bad—and I am not trying to put anybody down, but it is too bad for our country, because we should be straightforward about what we are about.

In any event, now Miss Lipsen, Professor Henderson stated four of the eight main provisions of this bill would have no effect on plaintiffs at all. If that is true, then you should agree that those provisions at least are not anti-consumer, or would you disagree with his analysis?

Ms. **Lipsen**. We respectfully disagree with his analysis. I can just talk about two major provisions in the bill. One is the FDA defense and the FAA defense that Dr. Wolfe talked extensively about this morning. The other is the limitation on joint and several liability as it pertains to noneconomic damages.

Noneconomic damages are real loss. Noneconomic damages are losses connected to losing your ability to have children, having disfiguring injuries, this kind of thing, that you really cannot quantify in a ledger. What this bill would do would be to discriminate, put up—that economic damages we should have joint and several liability for but noneconomic damages we should not. We think this is inappropriate. We also think that this provision, the joint and several liability provision, would under-compensate people.

In other words, if you happen to be injured—the unfortunate fact that you happen to be injured by two or three defendants, there is a possibility under this bill that you are going to get under-compensated because the doctrine of joint and several liability is eviscerated for noneconomic damages, and we oppose that as we always have before this Committee.

Senator **Pressler**. Professor Henderson, would you respond?

Mr. **Henderson**. What is interesting is, I did not give either of those two provisions she refers to as examples, where the bill is neutral. I listed those as examples where the bill cuts back, quite self-consciously, on plaintiffs' opportunities to recover, but in a good cause, because in my view the liabilities that exist under the law of many States are just unfair and insupportable.

The examples that I gave with respect to provisions that I do believe are neutral are rather the nonmanufacturer-seller's liabilities being curtailed only if curtailment does not prejudice the plaintiff's rights to recover. Why bring wholesalers and retailers routinely into these lawsuits and pay lawyers to sit there and chew gum?

Section 305, another example, the Worker Comp benefit off-set is going to be addressed later, I understand from the written statements, but it is to me doubly ironic that she would refer to a couple of provisions that I quite agree self-consciously cut back on what I think is untoward and unfair liability.

Senator **Pressler**. Just one closing question, Miss Lipsen. Do you support or oppose the alcohol and drugs defense provision in the bill?

Ms. **Lipsen**. We have no position on that provision.

Senator **Pressler**. That is very strange.

Ms. **Lipsen**. Why is it strange?

Senator **Pressler**. Well, it is an important provision of the bill. Would you not have a position on the alcohol and drug defense provision? Is it important to consumers? My word.

Ms. **Lipsen**. It is foreseeable that people are going to be injured in defective automobiles, and it is foreseeable that there will be people that are—that have been drinking in those cars.

Senator **Pressler**. But it is passing strange that someone who is so concerned—now, please, you have got to agree with me that you should take a position on that, should you not?

Ms. **Lipsen**. Should I not take a position on it? We have taken a position that has occupied the better part of about four hours. You want me to take a position?

Senator **Pressler**. Yes. Could you submit to us your position on the alcohol and drug defense provision?

Ms. **Lipsen**. Yes, I would be glad to.

Senator **Pressler**. You have no feeling about it?

Ms. **Lipsen**. We really have not evaluated that provision.

Senator **Pressler**. For what, for lack of time?

Ms. **Lipsen**. This is a provision that is supported by a majority of this Committee. I would be happy to evaluate it and submit our discussion to you.[1]

Senator **Pressler**. Thank you, Mr. Chairman.

Senator **Bryan**. Thank you very much, Senator Pressler.

I am going to exercise the prerogative of the Chair and just ask one question, if I may, and that is a number of members of the Committee have been greatly offended at a letter that was sent by Mr. Nader that I personally feel is outrageous.

One of the underlying tenets of a democracy is that there may be different points of view, and it does not necessarily mean, because a point of view which you entertain is different from the point of view that another person might have in this body, that that individual is corrupt in purpose or motive, or that somehow his position is not as honorably reached as is your own point of view, and so I find that Mr. Nader's letter is particularly repulsive to me because of its tenor, aside from the merit or demerit of the position that he may take on the bill. I make that separate and apart.

There has been some colloquy here that Mr. Nader is your boss. Very briefly, would you tell us what the relationship is? I think the record needs to be clear on that.

Ms. **Lipsen**. There is no relationship.

Dr. **Wolfe**. Could I respond to that? Mr. Nader was at one time on the Board of Directors of Consumers Union. He resigned because he disagreed with some of the policies of Consumers Union.

He was at one time the head of Public Citizen. He has had no connection with Public Citizen since 1980, when he convinced me, against my better judgment, to take over the organization from him, but Joan Claybrook is our boss now.

So Mr. Nader really has no connection at all with the organizations represented here today. He is his own boss, but he is not ours.

Senator **Bryan**. Thank you, Dr. Wolfe. Let me go to Senator Kasten. He looked like he may have had a question.

Senator **Kasten**. Dr. Wolfe, who wrote this letter that was written—you just said that Mr. Nader——

Dr. **Wolfe**. What letter are you talking about?

Senator **Kasten**. The letter that we have been referring to.

Dr. **Wolfe**. I have never seen the letter. I have never seen it, I have never heard of it, and so I cannot tell you who wrote it if I have never seen it or heard of it. I am sorry.

Senator **Kasten**. Let me just make sure that I understood what you said. You said that since 1980, Ralph Nader has had no connection with any of the Public Citizen groups. Is that what you said?

Dr. **Wolfe**. Yes. He was president and founder of Public Citizen. In 1980 or 1981, one of those years, he resigned as being the President of Public Citizen and he has not been on the board. We talk to him, but he has no institutional, structural connection with it, any more than he does with any number of hundreds of other groups that he may have started but then relinquished control over. That is correct.

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[1] As of going to press, July 12, 1990, the submission has not been received.

Senator **Kasten**. Would it be possible that Public Citizen or one of the Public Citizen umbrella groups, such as Public Citizen Health Research, would be at any time under any circumstances paying Mr. Nader's travel expenses throughout the United States?

Dr. **Wolfe**. Not that I am aware of, but I am not aware of a lot of things. I have never heard of anything like that. It is possible. I mean, his travel expenses I think are mainly paid by speaking engagements that he gives, for which he gets travel reimbursement and honoraria. I am not aware of what you are talking about.

Senator **Kasten**. I wanted to ask just one final question of Miss Lipsen, and I want to end where we began, because I think that what Professor Henderson said in his opening statement, with regard to a definition of consumers as being equal to plaintiffs is at the heart of the consumer opposition to this legislation. There are consumers who are paying for the cost of this system which is horribly inefficient, which is more like a jackpot or a lottery than like a system of compensation. Why is it that your definition of "consumer" is limited only to plaintiffs?

Ms. **Lipsen**. The subject of this hearing is product liability litigation. What we are concerned about are injuries relating to dangerous products. Those injuries have been as a result of purchasers and consumers and bystanders of those products, and that is why we register our concern.

Senator **Kasten**. You do not recognize an individual who might own a hardware store? He owns——

Ms. **Lipsen**. They have their own trade association, Senator.

Senator **Kasten**. He is also a consumer. Do you think it is fair to this whole group of consumers to have a system in which between 67 and 75 cents of every dollar is going to lawyers and transaction costs where with a more direct system we could have more of the dollars going to injured consumers?

Ms. **Lipsen**. We are appalled, as you are, by lawyers fees. There is nothing in this bill that will do anything about that problem. The way to get lawyer fees under control is not to make it more difficult for people that are injured to recover.

Senator **Kasten**. Dr. Wolfe, is the DPT shot an example similar to penicillin or aspirin of unavoidable unsafe products?

Dr. **Wolfe**. In some ways it is; in some ways it is not. I mean, when it came on the market it probably was. As you probably know, there have been some improvements, and they have been slow to be put into the state of the art vaccine.

A very close friend is a physician who has testified repeatedly for drug companies on this issue, and so I think it is a very complicated issue. The main question is are we going to continually get a safer vaccine than we have now. I think the answer is yes. Part is avoidable; part is unavoidable.

Senator **Kasten**. I am going to let Mr. Kingham answer, but I just want to ask, as a consumer representative how do you react to the fact that when we began this effort for some kind of product liability legislation in the early 1980s there were four manufacturers of that shot and the cost to consumers was roughly $2.80 a dose, and today, roughly eight years later, nine years later, we have one manufacturer, the cost is $11.80 to consumers?

A significant part of that might be because there is no more competition in the market, but it is also important to recognize that a significant part of that is tremendously costly insurance for this one last guy to stay in the market.

Dr. **Wolfe**. My reaction is that——

Senator **Kasten**. Is this an unavoidably unsafe product which, therefore, could be treated differently?

Dr. **Wolfe**. It can be made safer, I think, is the answer, and we supported the vaccine compensation bill which, as you know, passed and which I think you supported several years ago which provided an alternate remedy to tort litigation for people who were injured by vaccines.

Now I think vaccines are a special case, and they have been treated as a special case. That is my answer.

Mr. **Kingham**. I think vaccines are special, in that the evidence is overwhelmingly clear with respect to them. It is clear in other areas as well. The way consumers will ultimately benefit is if the research and development are done to make safer vaccines. You will only get research and development in that area or any other area by encouraging and fostering the investment it requires.

Punitive damage awards that are standardless do not do that. They do the opposite, and they are anticonsumer in my view.

Senator **Kasten**. Mr. Chairman, thank you.

Senator **Bryan**. Thank you. For the last comment on this panel, Senator Rockefeller.

Senator **Rockefeller**. Mr. Chairman, I welcome that. I guess I want to say in a sense that I kind of regret the tone of the entire morning. The point is that we really have not talked about the bill.

I have to say that I am very proud of the fact, Dr. Wolfe, that your Public Citizen Health Research Group gets money from the Rockefeller family fund, and I contribute to that every year and to you because I think you and Consumers Union and Ralph Nader have been a fundamental force for good in the history of this country and have done a lot more than most people in public life.

What saddens me is that we have all kind of jumped into our knee jerk postures in such of the savaging of Ralph Nader and does he or any of his groups get any money from this or that organization. You know, that is not the point. The point is, is this a good bill for consumers and for others or is it not?

I along with Senator Kasten have labored mightily to try to create a bill which in fact is not the way bills have been in the past. There are no caps on punitive damages. We do not limit the amount that a lawyer on either side can make, and we try to do things which are fair.

I am deeply troubled myself by the FDA bribery thing and thus very much think, along with you, Dick, that where there is bribery it should all be different. You know, in the Pinto case nothing changed under that. In Dalkon Shield nothing changed under that here. There is some very good stuff.

I regret, Ms. Lipsen, that you got such a pounding, too. I do not entirely regret it, but I regret it because I think you people do very good work. You keep us on our toes and make us accountable when we do things that are not right.

I think the product seller's provision in this would help to reduce costs. I think the statute of repose of 25 years would help to reduce costs. I think the expedited claims procedure which is set up in here, incentives and disincentives both working to try to expedite settlements, is good.

Mr. Chairman, the statement I want to make is that this is a serious bill, and we have made a serious effort for it not to be knee jerk. I went, as did Senator Kasten, before various business groups in this city saying, look, do not try to load up on this bill, do not try to make yourselves completely happy on this bill.

I mean, this has to be something which goes down the middle, which provides protection, which strikes the balance between those who would try to take advantage, let us say, of innocent victims and that they will be and will continue to be caught, and there will be no caps on punitive damages and, by God, that is a fundamental stability giver and safety encourager if there ever was one. It should stay in any bill, and I would fight any attempt to remove that or any or the other agreements that Senator Kasten and I came to.

I want to say that this could have been a more productive first panel for four hours, and I regret that because I do think that Senator Kasten and I worked hard to try to make it. Just the fact that the two-year statute of limitations based upon running from the point of discovery is really pro consumer/pro plaintiff stuff. It is not when did you get the disease. It is when did you discover that you had the disease. That is an effort to reach out to try to accomplish both purposes: one, to bring some kind of balance into the system and yet make sure that when that is discovered then the war is on.

So in a sense I regret it, and I think the Chairman feels somewhat uncomfortable. I think there has been too much personalization that has gone back and forth in all of this.

The bill, I submit, is important, and in a second panel we may be able to get to it. I hope we can.

Senator **Bryan**. Thank you very much for those comments, Senator Rockefeller.

Let me thank each member of the panel this morning for his or her testimony. We appreciate it. It is part of the record.

Now we will move on to the final panel: Mr. Thomas D. Wilcox, Executive Director and General Counsel, National Association of Stevedores; Mr. Victor E. Schwartz of Crowell & Moring here in the Nation's capital; Mr. Paul Safchuck, President, White Lung Association; and Mr. Alfred W. Cortese of Kirkland & Ellis here in Washington, D.C.

We will begin our second panel by hearing from Mr. Wilcox, the Executive Director and General Counsel of the National Association of Stevedores.

Mr. Wilcox, we promised you a thought-provoking session. This legislation, as you can see, engendered a good bit of passion, so perhaps maybe we might talk a little bit more about the bill in this panel.

STATEMENT OF THOMAS D. WILCOX, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF STEVEDORES

Mr. WILCOX. Mr. Chairman, thank you. This is my first appearance before this subcommittee or this committee on this subject even though it has been going on for the past ten years. I feel compelled, first, to make a disclaimer. The National Association of Stevedores has no connection with Ralph Nader and is not funded by the American Trial Lawyers Association or any member thereof to my knowledge. The association has no PAC. As its executive director and general counsel, I cannot tell you to whom my members contribute.

Mr. Chairman and Members of the subcommittee, my name is Thomas D. Wilcox, and I am and have been since 1973 the executive director and general counsel of the National Association of Stevedores. The National Association of Stevedore member companies constitute the vast majority of the privately owned marine terminal and stevedoring industry in the United States. Some members operate in the states from which your Members come, and some of your committee Members have no ports so we do not operate there.

NAS member companies provide necessary transportation services and use a variety of equipment both owned and leased to safely and efficiently transfer water borne cargoes between ships and the inland transportation system. Most NAS employers and employees are subject to the Federal Longshore and Harbor Workers' Compensation Act and to the workers' compensation acts in every state in which they operate.

On behalf of all NAS member companies, I thank you for the opportunity to appear before this subcommittee today.

First, I would like to apologize for the error in my prepared statement on page 5, line 23, which refers to a recent publication by the American Insurance Association. The dates should be 1990, not 1989. Actually, the report just came out last week having to do with the crisis in the workers' compensation program nationwide.

I hope to confine my remarks to two sections of the bill which I think are irrelevant and should be removed from the bill. The NAS and other service organizations and companies—and I think you have heard or will hear from other service companies, those who do not manufacture products but those who use products—are concerned with two sections in S. 1400, section 103(c)(2) and section (305).

As to the rest of S. 1400, the NAS has no opinion because, not being product manufacturers, we really feel that we have nothing to add to the debate on that subject.

The two sections referred to force into the spotlight a serious conflict between two segments of American industry and two legal systems. The one conflict is between equipment manufacturers and equipment users. The other conflict is between a tort product liability system and a no fault workers' compensation system, State and Federal.

Historically, both politically and judicially the conflict between the tort and the no fault legal system have been resolved in favor of the no fault workers' compensation system. Even the proponents of S. 1400 acknowledge that the majority of the states of this union authorize employers to enforce the lien for the workers' compensation benefits paid to their employees who are injured on the job because of the fault, either total or partial, of any third party. That is the law in the overwhelming majority of the 50 states.

That, too, is the law in the only two workers' compensation laws passed by the U.S. Congress, the Federal Employees Compensation Act, known as FECA, and the Longshore and Harbor Workers' Compensation Act which we will refer to as the Longshore Act in shorthand.

Why? Because Congress and the State legislatures throughout this country have decided as a matter of public policy that workers' compensation is their primary concern, and attempts to weaken that system are strongly resisted.

As to the Federal laws, the Supreme Court has given its own rationale. The Longshore Act, the Supreme Court said the purpose of the lien is to enable employers to have the resources necessary to pay their workers' compensation. That is the *Bloomer* case cited in my written testimony.

As to the United States and the Federal Employees Compensation Act, the Supreme Court stated that the purpose of the compensation lien there is to minimize the government's workers' compensation costs. That case, which is not cited in my written statement, is *United States* v. *Lorenzetti*, 467 U.S. 167. That was decided in 1987.

To date as between the tort system and the workers' compensation systems, public policy demands that the workers' compensation system prevail. Mr. Chairman, section 103(c)(2) and section 305 are contrary to public policy, and, to my knowledge, to date no evidence or argument has been presented which suggests that there be a change in that policy.

It is beyond question that the workers' compensation systems nationwide are in very serious trouble. The proponents of S. 1400 allege that the product liability system is also in trouble; however, no one suggests that the problems of the product liability system even begin to approach the problems of workers' compensation in magnitude. In that regard, the words of the noted Professor Arthur Larsen quoted in our statement cannot be dismissed.

Professor Larsen said, quoting, "If the products liability system law has got out of hand, the necessary correction should be made within the boundaries of products liabilities law. They should not be made by distorting longstanding compensation principles completely out of shape." We and others like us agree with Dr. Larsen.

Here again, I do not want to surprise the committee, but I just got this piece of paper yesterday. I might add that this committee in 1986 with respect to the Longshore and Harbor Workers' Compensation Act in its report 99-422, pages 29 and 67, which had to do with products liability, specifically provided that that act would not preempt the Federal Longshore and Harbor Workers' Compensation Act, which in itself had just been amended in 1984.

As to the Federal Compensation Act, I am unaware that the Department of Labor, which administers that act for all Federal agencies and pays about $1.3 billion annually to injured government employees, has agreed to forego the government's statutory right to recoup the compensation paid from responsible third parties. I am also unaware of any activity by the Senate and House Labor Committee to amend either the Federal Employee Compensation Act or the Longshore and Harbor Workers' Compensation Act. In fact, in 1972 and again as late as 1984 those two committees and this Congress improved the compensation lien situation of the Federal Longshore and Harbor Workers' Compensation act.

Finally, the suggestion that eliminating the compensation lien with respect to product manufacturers will somehow improve workplace safety is sheer nonsense. That represents to us a total lack of understanding of workplace safety, the nature and the cause of workplace injuries and the causes of the crisis in the workers' compensation system.

To a service industry workplace safety is a 24-hour-a-day, primary, number one concern for without a safe workplace and noninjured workers, the service company such as an NAS member company cannot function, and I might add here that as to our industry, workers' compensation costs are the second highest costs in the whole panoply of employer costs other than payroll.

Now, while the compensation lien does help employers to pay future compensation as the Supreme Court stated in the *Bloomer* case, it is not and never was a substitute for vigorous safety program nor a financial justification to reduce those efforts. Indeed, one is tempted to comment that if the proponents of S. 1400 were successful with respect to retaining sections 103(c)(2) and section 305, there would be a reduced incentive to manufacturer safe products. But I, for one, do not so allege.

The point is, fix the product liability system, but within its own legal parameters, not to the detriment of an overly troubled workers' compensation system. We urge you to delete sections 103(c)(2) and 305 from S. 1400. Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF THOMAS D. WILCOX, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF STEVEDORES

My name is Thomas D. Wilcox and I am the Executive Director and General Counsel of the National Association of Stevedores (NAS).

The forty-five (45) NAS member companies and their subsidiary or related companies are privately owned marine terminal operator/stevedore companies conducting business on all four of the nation's seacoasts, Alaska, Hawaii and the Commonwealth of Puerto Rico.

NAS member companies do not manufacture products. They are transportation service providers who purchase or lease and use a variety of equipment, such as cranes and forklift trucks, necessary to safely and efficiently transfer this nation's waterborne commerce between ships calling at our ports and the inland transportation system. Sometimes that equipment breaks or malfunctions and NAS member company employees, longshoremen and marine terminal workers, are injured or killed. Like every other American employer, NAS member companies must pay workers' compensation benefits to such employees regardless of fault if the injury of death is work related.

S. 1400 is entitled "*A bill to regulate interstate commerce by providing for a uniform product liability bill, and for other purposes.*" The NAS neither supports nor opposes all that precedes the comma in the title. However, the NAS does oppose strongly all that follows the comma, ..."other purposes," which are to amend, by superseding, all state and Federal workers' compensation laws.

Section 103(c)(2) specifically provides that S. 1400 would supersede the Federal Employees Compensation Act (FECA) 5 U.S.C. secs. 8101 et seq., and the Longshoremen and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. sec. 901 et seq.

Section 305 of S. 1400 would amend all state and Federal workers' compensation laws, FECA and the LHWCA included, by denying to employers the traditional lien for workers' compensation benefits paid to their injured employees for workplace injuries caused by third party product manufacturers. In addition, the bill would reverse longstanding legal precedent by permitting such product manufacturers, and they alone, to deduct from any employee third party damages recovery, the full amount of workers' compensation benefits paid by the employer.

The NAS and other service industries opposed that concept when it was first proposed and have continued to oppose it ever since. The NAS opposes it today and will oppose it tomorrow. That should surprise no one, particularly the proponents of S. 1400.

S. 1400, as drafted, forces two avoidable conflicts. One between the product liability tort, or fault, legal system and the no-fault workers' compensation system, both state and Federal. The second conflict is between the industries which manufacture products and those industries which use machinery and equipment. As long as sections 103(c)(2) and 305 remain in the bill, those conflicts will remain and no consensus can be reached within American industry.

There is little doubt that the two legal systems are in trouble. However, the workers' compensation system is in deeper trouble than the product liability system. That trouble will be exacerbated by S. 1400 without any significant benefit to the product liability system, as was pointed out to the Committee in recent testimony by the American Insurance Association. Thus, the caution expressed by the noted Professor Arthur Larsen in his latest treatise on workers' compensation law is most appropriate and should be carefully observed. Professor Larsen said in the context of the conflict between the tort and no-fault systems:

> "At least one unqualified caution will be ventured: the solution should be based on what is good for compensation law. If products liability law has got out of hand, the necessary corrections should be made within the boundaries of products liability law; they should not be made by distorting long-standing compensation principles completely out of shape.
>
> "Finally, in choosing between the values identified, it is worthwhile to recall that one of the most important values stressed by the early founders of workers' compensation was getting rid of the uncertainties and complications of commonlaw litigation and substituting simple, near-automatic remedies. This ideal, as it turned out, was not to be realized, but at least it can be said that any step in the direction of simplicity is a step toward one of the oldest and finest traditions of workers' compensation." (Larsen, The Law of Workmens' Compensation, sec. 76.93, pg. 14-899, 4/88 Rev.)

With respect to the LHWCA, the conflict between the tort system and the workers' compensation system has long legislative and judicial histories, and in each such conflict the workers' compensation system has prevailed and the employers' compensation lien preserved. The workers' compensation system takes precedence over the tort system, apportionment of damages, credits and the like because the overriding public interest underpinning the compensation lien is to assure that employers will have adequate resources to meet their no-fault obligation to pay compensation to injured workers. Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74 (1980).

Congress amended the LHWCA in 1972 (P.L. 72-576) to increase the level of compensation benefits and to strengthen the employer's compensation lien. It amended the Act again in 1984 (P.L. 98-426). With respect to the 1984 amendments, the Senate-House Conferees from the Senate Committee in Labor and Human Resources and the House Committee on Education and Labor stated:

> "The Conference substitute provides that the 6-month period within which a person entitled to compensation can file a third party suit commences only upon the entry of a formal order awarding compensation. This is in accord with the decision in Pallas Shipping Agency v. Duris, S. Ct. 1991 (1983). The conferees expect that an employer who does make voluntary payments will be able to obtain without delay the necessary compensation order constituting the formal award, so that the 6-month period may commence. Once the assignment occurs, the employer has 90 days within which to file suit; otherwise, the right to sue reverts back.
>
> "The Conference substitute establishes the following priority for distribution of proceeds in a recovery by an employee: First, the litigation expense, including reasonable attorney fees, are satisfied. This may require that the court exercise its discretion to adjust the attorney fee to assure equity for both the employee and his attorney. The compensation lien on the net recovery remains inviolable, consistent with Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980)." (House Report 98-1027 at page 36, Emphasis supplied.)

That statement was made concerning amendments to section 33 of the Act (33 U.S.C. sec. 933), entitled Compensation for Injuries Where Third Parties Are Liable, a provision similar in purpose to section 31 of FECA (5 U.S.C. sec. 8131), both of which specifically authorize the employer to seek reimbursement of compensation payments made from third-party tortfeasors, without setoff or credit, and without limitation of the class of tortfeasor.

In addition, section 33 of the LHWCA was amended in 1984 to give a similar lien or right of action to the Secretary of Labor for compensation benefits paid from the second injury, or Special Fund, of the LHWCA. Those payments are made by the Secretary from a trust funded by self-insured employers and insurance carriers to injured employees who had a prior disability at the time of employment and who subsequently suffered a second injury.

The Conference report was adopted without a dissenting vote by both the Senate and House and became law (P.L. 98-426). In 1984 the Congress stated that as to the LHWCA the employer's compensation lien was "inviolable." S. 1400 would violate that which Congress has held to be inviolable, and to that the NAS strongly objects.

Finally, it must be pointed out that the crisis of the workers' compensation system affects all American industry - all employers and all insurance carriers. According to the American Insurance Association, annual workers' compensation payments are costing employers $24 billion, and that for the last 17 years, claims costs and expenses associated with them have exceeded premium income. (Workers' Compensation, An Agenda for Change, AIA, May 1989.) As to the LHWCA, the workers' compensation crisis has been witness to recent insolvencies of major LHWCA underwriters and a dramatic increase in the number of self-insured employers. According to Department of Labor statistics, almost half of the

$290 million LHWCA compensation benefits in 1988 were paid by self-insured employers, and half of the $55 million paid by the LHWCA Special Fund went to employees of self-insured employers.

A self-insured employer must pay workers' compensation benefits from operating revenues derived from its business. In addition, under current Department of Labor regulations, it must fully collateralize all reserved or future compensation benefits. That means that a self-insured employer must set aside today the full estimated cost of a claim which may have an extended payment period. If there is a reasonable prospect that a third party recovery is obtainable and the compensation lien recoverable, the reserve and collateralized amount may be reduced, thus enabling the employer to make compensation payments to injured workers. S. 1400 would interfere with that and further jeopardize an already critically troubled compensation system.

There are some who say that the compensation lien does not amount to much, and that employers should not be concerned about losing it. Well, they are wrong. To the NAS, and other employers, especially those who are self-insured, the compensation lien means a lot. For example, recently there have been two incidents of equipment failure and breakage which resulted in three deaths and one permanent total disability. The reserves on each incident are over $1 million. In each there are pending claims against the machine manufacturer. In the meantime, the two employers are paying compensation regardless of their fault. To them, $1 million is a lot of money and seriously affects their ability to meet their obligations under workers' compensation laws, here the LHWCA.

This problem is not unique to NAS member companies. All employers face the same problem. The workers' compensation system is in serious trouble. The product liability tort system may be in trouble. But as Professor Larsen has cautioned: fix the one without harming the other. Delete sections 103(c)(2) and 305 from S. 1400. If necessary, fix the product liability system, but do not further harm the workers' compensation system.

Senator BRYAN. Thank you very much, Mr. Wilcox. Mr. Schwartz, we will hear from you now.

STATEMENT OF VICTOR E. SCHWARTZ, REPRESENTING THE PRODUCT LIABILITY ALLIANCE

Mr. SCHWARTZ. First, Mr. Chairman, I wanted to thank you for holding these hearings and express appreciation for the fairness in which you have conducted them and also to thank Senator Kasten. Senator Kasten, we have grown old together with this bill. I think that the bill has reached fruition and has struck a balance. There have been many, many changes made to accommodate the interests of different parties, including this particular section 305 that I am * * * testifying today. I am testifying today on behalf of the Product Liability Alliance, which is composed of about 350 different trade associations and manufacturers and wholesale distributors and supports this bill, S. 1400 and section 305.

Section 305 is not directed at restricting anybody's rights to sue, as it is true with most of the bill. The purpose of the section is twofold. It is to enhance safety, and it is to reduce legal costs.

I think one has to begin with some basics that almost all of us know. When an injury occurs in the course of employment, a person collects worker compensation. That system should help encourage employers to keep their workplace safe. But Professor Larsen, who Mr. Wilcox quoted, said the present system does not do that.

Let us take some concrete examples. An employer removes a guard from a machine. An employer fails to instruct workers properly in the use and handling of a dangerous chemical. What can happen is the worker collects worker compensation, but then he also can sue the product manufacturer because in a doctrine not addressed by the bill, that of foreseeable alteration or foreseeable misuse, the product manufacturer can be subject to liability. Although the employer's negligence caused the accident, the employer or his compensation carrier can join in the employee's lawsuit and in the overwhelming majority of states, as Mr. Wilcox suggests, collect the full and complete amount of money he paid in worker compensation.

To address this problem some states, specifically Illinois and New York, have allowed the product manufacturer to bring what is called a contribution claim against an employer. In other words, a tort suit within a tort suit. So, if the employer was 40 percent at fault, he ends up repaying 40 percent of the tort judgment.

When I was back at the Federal Product Liability Task Force and we first looked at this problem, we thought that that was a good solution. But when we went public with it, we heard from almost every major insurance company that writes either type of coverage in America. They said that this would increase legal costs, it would not be equitable because it would allow in through the back door of a contribution claim what is prohibited through the front door of the worker compensation immunity shield. So we dropped it and S. 1400 prohibits it.

When I chaired the Federal Product Liability Task Force, we looked at almost every possible solution to this problem of the workplace injury where the employer is able to recover full subrogation. The Task Force came up with a solution that was derived from Professor Larsen, who Mr. Wilcox referred to, and I would ask apart from my statement that the portion of his treatise be placed in the record.

Senator **Bryan**. That will be made a part of the record by reference.

Mr. **Schwartz**. Professor Larsen felt so strongly about this issue that he came here to testify in front of Senator Kasten on S. 44 and endorsed this particular section of the bill. That was his only purpose for coming here.

Professor Larsen noted that this particular provision of the bill represents very sound public policy. It reduces legal costs because it keeps the worker compensation system and the product liability system separate and apart. Generally, there would not be lawsuits back and forth between the two systems. It places needed incentives on employers to keep their workplaces safe. If an employer is at fault in creating a product-related accident, he loses his subrogation lien.

All of this is achieved without restricting the employee's rights to sue. In almost every state, the employee would be recovering the same amount of money as he does today because in almost every state he does not get that subrogation lien money. It goes either to the worker compensation carrier or his employer.

During the 100th Congress some businesses mentioned that there was unfairness in the provision because an innocent employer, who had not brought about an accident would lose his subrogation lien. So, in the House bill, H.R. 1115 a provision was added so that an innocent employer would not lose his subrogation lien.

Recently some businesses have talked to us and said there are procedural ways that might be added to the bill to help assure that an innocent employer might be able to keep his lien. We have tried to address that problem and also attached to my statement is some suggested language to assure that if an employer is innocent and he has not brought about a workplace accident that he can keep his subrogation lien.

In sum, this provision places incentives for accident prevention where they will do the most good, and it should substantially reduce legal costs. It achieves these goals by improving the system and not by restricting victims' rights. It was sound judgment to incorporate it in prior Senate bills, and it is sound judgment to incorporate it in S. 1400. Thank you.

[The statement follows:]

TESTIMONY BY VICTOR E. SCHWARTZ, ESQUIRE

Thank you for your kind invitation to testify about Section 305 of S. 1400, the Federal Product Liability Reform Act.

I am testifying on behalf of The Product Liability Alliance -- a coalition of over 350 businesses and trade associations that supports the enactment of S. 1400. My interest in the topic stems from my involvement in the subject for over the past two decades. I have taught the subject of tort law since 1967 first on a full time and then on an adjunct basis. I am co-author of the most widely used torts casebook in the United States, Prosser, Wade and Schwartz, Cases and Materials on Torts (8th ed. 1988). I am also co-author of two treatises relating to product liability, Product Liability Cases and Trends and Guide to Multi-state Litigation, and am author of the principal text on comparative negligence.

For almost five years I served in government as Chairman of the Federal Interagency Task Force on Product Liability and the Federal Interagency Council on Insurance and Accident Compensation. In these roles, I helped draft the Uniform Product Liability Act ("UPLA") and the Risk Retention Act which is now Federal law.

During the past decade I have been a partner in the law firm of Crowell & Moring where I co-chair the firm's torts and insurance practice group. In this capacity I have represented both plaintiffs and defendants and helped develop product liability legislation at both the state and Federal levels. While I testify today on behalf of TPLA, my views are derived from these experiences.

In two key ways Section 305 is representative of many other parts of Senate Bill 1400. This is because its principal purposes are to encourage safety and reduce legal costs. It is not intended to and does not curb the rights of injured persons.

To appreciate Section 305 one has to go back to basics -- the basics of the workers' compensation system. That system is designed to provide workers with basic economic losses when they are injured in the course of employment -- regardless of whether the injury occurred through the fault of the employer or the employee. According to the leading treatise author in the field, Professor Arthur Larsen, the system should also encourage employers to keep their workplaces safe. Nevertheless, as Professor Larsen notes, the current method of interface between the workers' compensation system and our product liability law produces the very opposite result.

To graphically illustrate this, let us take some concrete examples. Suppose today that an employer removes a safety guard from a machine,[1/] fails to properly repair or maintain

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[1/] See, e.g., Dukes v. J.I. Case Co., 137 Ill. App.3d 562, 91 Ill. Dec. 710, 483 N.E.2d 1345 (1985).

equipment,[2/] or fails to properly instruct workers about the safe handling of chemical substances or machines.[3/]

In each of these instances a product liability suit may arise. Courts may say that a product manufacturer should have anticipated such negligent conduct by the employer. If the workers brings a product liability action, the employer or his workers' compensation carrier can join in that action and assert a subrogation lien for the total amount of workers' compensation that has been paid to the employee. If the product liability suit is successful, the law in the overwhelming majority of states will allow the employer to collect that full amount of money. This is true even though the employers' fault precipitated the injury. One does not have to be an expert to appreciate that this is not a very good system.

To address this inequity, some states, specifically New York and Illinois, have permitted a product manufacturer in the context of a product liability suit to bring what is called a "contribution claim" against an employer. If the employer is found to be 40 percent at fault, he ends up paying 40 percent of the tort award to the product manufacturer in the contribution suit. When I first studied this problem in 1976, this seemed a

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[2/] See, e.g., Alm v. Aluminum Co. of America, 687 S.W.2d 374 (Tex. App. 1985), reversed in part on other grounds, 717 S.W.2d 588 (Tex. 1986).

[3/] See, e.g., Wagner v. International Harvester Co., 611 F.2d 224 (8th Cir. 1979).

fair resolution of the inequity in the current system, and it appeared as a suggestion in early papers of the Federal Product Liability Task Force. The reaction to this suggestion was swift and very critical. We were told by both small businesses and insurance carriers that the New York/Illinois approach solved one problem by replacing it with another. By allowing contribution claims by manufacturers against employers, it allowed through the back door of such a claim what is prohibited in the front door by the workers' compensation immunity shield. The approach indirectly made the employer pay for a full blown tort award; he had bargained out of paying that award by his acceptance of the workers' compensation system. Moreover, it created a lawsuit within a lawsuit and substantial additional legal costs.

In the Uniform Product Liability Act and in every principal proposed Federal legislation since the effort began in 1981, the approach taken was one that is similar to S. 305. This approach was the creation of Professor Larsen.[4/] The approach eliminates the subrogation lien. This is a benefit to the product manufacturer because he does not have to reimburse an employer for his no-fault workers' compensation payment. Second, it forever bars contribution and indemnity actions by product manufacturers against employers. This ensures the integrity of the workers' compensation system and prevents employers from having to pay what

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[4/] See A. Larsen, Workmen's Compensation 76.92(c) (Desk Ed. 1990).

is in essence a tort award. Finally, in the overwhelming majority of states the proposal does not reduce the amount an employee would collect today -- subrogation liens do not flow to the plaintiff, but to the employer or his workers' compensation carrier.

The approach represents very sound public policy. It reduces legal costs because it keeps the workers' compensation system and the product liability system separate and apart. There would not be lawsuits back and forth between employer and product manufacturer. It places needed incentives on employers to keep their workplaces safe -- if the employer is at fault in creating a product-related accident, he loses his subrogation lien. Again, all this is achieved without restricting the employee's right to sue in product liability.

During the 100th Congress when the proposal was being considered in the House, some small businesses presented a constructive criticism of the proposal. They noted that an innocent employer could lose his subrogation lien, and they contended that that was not fair. To meet that criticism, a provision was included so that an innocent employer would not lose his lien. This provision was incorporated in Section 305 of S. 1400. Nevertheless, during the course of discussion this year, some businesses pointed out that the bill did not have procedural safeguards to assure that innocent employers could enter a product liability action and keep their subrogation lien. Attached to my testimony is draft language that is intended to assure and make certain that an employer would have that right. Thus, if he properly trained his employees and did not negligently alter equipment and in general he was not at fault, he would retain his subrogation lien.

Mr. Chairman and other members of the Subcommittee, S. 305 represents sound public policy. It places incentives for accident prevention where they will do the most good, and it should substantially reduce legal costs. It achieves these goals by improving the system, not by restricting victims' rights. It was sound judgment to incorporate the provision in S. 1400.

ATTACHMENT

Amendment to S. 1400, the Product Liability Reform Act

Uniform Standards for Offset of Workers' Compensation Benefits

Sec. 305.(a) In any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, any damages awarded shall be reduced by the sum of the amount paid as workers' compensation benefits for such harm and the present value of all workers' compensation benefits to which the employee is or would be entitled for such harm. The determination of workers' compensation benefits by the trier of fact in a civil action subject to this title shall have no binding effect on and shall not be used as evidence in any other proceeding.

(b) A claimant in a civil action subject to this title who is or may be eligible to receive compensation under any State or Federal workers' compensation law must provide written notice of the filing of the civil action to the claimant's employer within 30 days of the filing. The written notice must include information regarding the date and court in which the civil action was filed, the names and addresses of all plaintiffs and defendants appearing on the complaint, the court docket number if available, and shall include a copy of the complaint which was filed in the civil action. A copy of such written notice shall be filed with the court and served upon all parties to the action. A claimant's failure to comply with the requirements of this subsection shall suspend the deadlines for filing responsive pleadings and commencing discovery in the civil action, until the claimant complies with the requirements of this subsection.

~~(b)~~(c) In any civil action subject to this title in which damages are sought for harm for which the person injured is entitled to receive compensation under any State or Federal workers' compensation law, the action shall, on application of the claimant made at claimant's sole discretion, be stayed until such time as the full amount payable as workers' compensation benefits has been finally determined under such workers' compensation law.

~~(c)~~(d)(1) Except as provided in paragraph (2) of this subsection, unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller if the harm is one for which a civil action for harm caused by a product may be brought pursuant to this Act.

(2) Paragraph (1) of this subsection shall not apply if the employer or the workers' compensation insurer of the employer establishes, and the trier of fact determines, that the claimant's harm was not in any way caused by the fault of the claimant's employer or coemployees. In order to establish this fact an employer or the workers' compensation insurer of the employer may intervene in a civil action filed by an employee at any time after the filing of a complaint. In the event that the civil action is resolved prior to obtaining a verdict by the trier of fact, any resolution of the action by settlement or other means shall afford the employer or the workers' compensation insurer of the employer an opportunity to participate and to assert a right of subrogation, contribution or implied indemnity if the claimant's harm was not in any way caused by the fault of the claimant's employer or coemployees.

~~(d)~~(e)(1) Except as provided in subsection ~~(e)~~(f), in any civil action subject to this title in which damages are sought for harm for which the person injured is or would have been entitled to receive compensation under any State or Federal workers' compensation law, no third party tortfeasor may maintain any action for implied indemnity or contribution against the employer, any coemployee, or the exclusive representative of the person who was injured.

(2) Nothing in this Act shall be construed to affect any provision of a State or Federal workers' compensation law which

prohibits a person who is or would have been entitled to receive compensation under any such law, or any other person whose claim is or would have been derivative from such a claim, from recovering for harm caused by a product in any action other than a workers' compensation claim against a present or former employer or workers' compensation insurer of the employer, any coemployee, or the exclusive representative of the person who was injured. Any action other than such a workers' compensation claim shall be prohibited, except that nothing in this Act shall be construed to affect any State or Federal workers' compensation law which permits recovery based on a claim of an intentional tort by the employer or coemployee, where the claimant's harm was caused by such an intentional tort.

~~(e)~~(f) Subsection ~~(d)~~(e) shall not apply and applicable State law shall control if the employer or the workers' compensation insurer of the employer, in a civil action subject to this title, asserts or attempts to assert, because of subsection ~~(c)~~(d), a right of subrogation, contribution, or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller.

Explanation:

This amendment makes three changes to Section 305 of S. 1400.

(1) It requires the claimant to notify the employer upon filing a product liability action against a manufacturer or product seller. The purpose of this change is to enable the employer to enter into the product liability action to attempt to assert its subrogation lien.

(2) It allows the employer or the workers' compensation insurer of the employer to enter into the product liability action to attempt to obtain a subrogation lien.

(3) If the product liability action is going to be settled, the employer must be given an opportunity to participate in the settlement negotiations in order to argue that the claimant's harm was not caused by the fault of the employer or any coemployees, and to assert a right of subrogation.

Senator BRYAN. Thank you very much, Mr. Schwartz. Mr. Safchuck, would proceed.

STATEMENT OF PAUL SAFCHUCK, PRESIDENT, WHITE LUNG ASSOCIATION, BALTIMORE, MD

Mr. SAFCHUCK. First of all, my name is Paul Safchuck. I am one of the millions of asbestos victims in this country, the United States. I also have been suffering and have been denied justice and compensation for over nine years, and that is just about average. That is not right.

First of all, I want to know, is this a hearing on the integrity of persons and organizations or is it a hearing on S. 1400?

Senator BRYAN. We want to hear from you as to the bill itself. This is supposed to be a hearing on the bill itself, Mr. Safchuck, so you go ahead and talk to us about the bill and what you think about it.

Mr. SAFCHUCK. I do not want to bring up any questions. What I want to do is to present the victim's side, point of view of the situation that has confronted the public and the victims, which I am one of. For your reference of how much justice and compensation there is, we are holding a national demonstration right here in Washington, D.C. by the White Lung Association on behalf of the asbestos victims that have been denied justice and compensation.

What I am here for is to try to stress to you that this bill, S. 1400, the way the victims understand it and the way I understand it and my organization understands it is not sufficient to service the people of this country because it does not give the victim the right, but protects the industry from the victim.

The victim is the innocent person, not the industry. They are the wrongdoers. They have produced that product. For the people to have their health and lives destroyed, and it was produced as a safe product for the public to use, people to work with and to live with.

I have suffered like many other asbestos victims beyond any other victim or person financially or physically, and it is uncalled for. And this bill, as far as I am concerned, will not solve my problem or millions of other people's problems that have been made victims of some source of hazardous product, products that have been tested by the industry and found out to be hazardous, but was produced and sold to the public for the sole purpose of making money. That is not what our forefathers fought for over 200 years ago.

I am slightly deviating from my written report because of the simple reason of what I have heard here from people discussing about the victims, the innocent people, how they should be treated.

Well, we are people just the same as you are. We were at one time in economic health to the whole country and now you are telling us that because our health and our life is destroyed, we have no economic, financial issues. That is wrong because the financial and economic issues of the whole country depends on the health and the welfare of the people, not one industry or any other one individual, but as whole people as our forefathers fought for. Government for the people by the people. We have just as much right to justice and compensation as anybody else, and we want that justice and compensation and we are going to demonstrate against it time and time again until we waken the public up to the facts, what is going on.

I want you to understand that. We are not giving up. We are Americans, and we will fight as Americans for our rights in this. And this bill is not giving us our rights.

We have bills. We have people that have waited 15 years to be compensated. Why? Because our courts are clogged up with cases that judges refuse to hear. Judges say it is too complicated yet, it is not too complicated to make a people victims by destroying their health and lives.

It seems to me the economy of this government today is to see how many people's health and lives can be destroyed by the industries, producing unsafe products to be used by the public to make money. Without being held responsible for the destruction of peoples lives and of the environment. Telling people their destroyed health and life has no financial value, when the financial value of the whole country depends on their health and life is wrong. They have no rights to compensation for their losses, because health and life is beyond value.

We are the workers, the backbone of this nation. And I think we have a right as the backbone because one thing I am going to tell you, I had my backbone destroyed. Once you destroy your backbone, you destroy the whole body. And that is destroying the nation.

That is why today—let me tell you one thing. The asbestos has been made the biggest, the costliest problem that people in the United States have today and will have until it is resolved properly. And the only way you are going to resolve it properly is to hold the people that made the people victims responsible, totally responsible, because they knew beforehand. Their own medical profession told them that thousands or hundreds of thousands, millions of people would suffer from this product. Yet nobody has seen to it that this product was taken care of, and there are many others today that way.

Well, this bill is taking the responsibility from the industry like the asbestos industry and making the victims responsible. Is that fair? Then did I ask to be an asbestos victim? No, I did not even know I was being made an asbestos victim. Now, I am suffering and they tell me there is nothing they can do for me. I cannot get justice, I cannot get compensation, yet I have government here that I pay taxes all my life and worked hard and hard to protect.

I worked in a shipyard where the ships needed to be in World War II to be produced so that we could go protect this country. I was told—I wanted to go in the service and I was told no, Paul, your service is demanded in the shipyard where the ships are being built, and that is where I have been exposed to asbestos, and that is why I am suffering.

Now, asbestos—let me tell you, there is no safe asbestos. I, with the help of research of many professional people, I have studied and they have studied, and we have found there is no safe asbestos.

Senator **BRYAN**. Mr. Safchuck, we appreciate your testimony. We do have a limited time. Your full statement which you have submitted will be made a part of the record as your testimony. But several of the members, I think, do have to get on to other hearings, and so we would just ask you to remain.

Mr. **SAFCHUCK**. Well, I could talk on this because like I told you, I have studied over years with many dependent professional people on this, and I have the resources. If you come to my offices, I will show you the documentation, the books and everything else on these issues. It is a very serious problem, and I think this S. 1400 is not the bill to correct it.

[The statement follows:]

STATEMENT OF PAUL SAFCHUCK, PRESIDENT, WHITE LUNG ASSOCIATION

My name is Paul Safchuck, Iam From Baltimore, Md. I am one of the millions of people made physical and financial asbestos victims in U.S.A. I am also the national president of the White Lung Assiciation (W. L. A.). W. L. A. is a national non-profit, educational, informational asbestos victims organization. Founded and organized by the asbestos victims, their families, and people exposed to asbestos. For the benefit of the people with asbestos caused problems. The asbestos that was produced and marketed by the Asbestos Industries as a safe product for the public to use and people to work and live with.

The national office of the White Lung Association or W. L. A. is at 1601 St. Paul St., Baltimore, Md. 21202. W. L. A. has chapter in many U. S. sates and members in all states of U. S. A.

W. L. A. has many goals and programs to resolve the asbestos issues and problems for the benefit of all people concerned.

> The number one is to educate the people of the hazards of asbestos to their healths and lives and how to proctect theirselves from those hazards.
>
> Number two, is to STOP the destruction of people's healths and with asbestos with proper removal and disposed of asbestos.
>
> Number three, is to help people that have been made physical and financial, get justice and compensation for their losses caused by asbestos, that was produced and sold by the Asbestos Industries.
>
> Number four, is to resolve the asbestos problems as soon and properly as possible, for the benefit of all people concerned.

At this time I want to thank the Chairman Senator Richard Brvan of the consumers subcommittee and the panel for letting speak in behalf of the millions people that have been made and are still are being made asbestos victims and their families.

I worked for Bethelhem Sparrows Point Shipyard for 40 years where I was exposed to asbestos while working.

I have been diagnosed by a doctor as having a disease called Asbestosis caused by asbestos. AsbestosIS is a disease that is only caused by asbestos.

Asbestosis is a disease that slowly destroys the function of peoples lungs until they no longer can breath and choke to death if no other asbestos caused disease or infection does not kill the person first. There is no cure for asbestosis.

Prevention is the only known cure for asbestos caused diseases and infections.

A study and research done on asbestos over many years by responsible professional people and myself on asbestos have found there is no safe asbestos as produced or safe level of asbestos exposure.

Some people are saying, that chrysotile asbestos is safe enough for people to work and live with and should NOT be removed from where ever it is today. Yet there will as many peoples healths and lives destroy by chrysotile asbestos caused disease and infection as there will be from other kinds of asbestos.

Some people are saying that low level of asbestos exposure is not harmful to worry, yet there be hundreds of thousands of people will have their healths destroyed and die from low level of asbestos exposure.

There are 2 kinds diseases, the only known cause is asbestos. They are Asbestosis and Mesotheliomia Cancer.

I was diagnosed by a doctor and said I have asbestosis, a disease that is only caused by asbestos in 1981. So went filed a personal injury claim against the Asbesots producers that caused the disease, that caused my personal injury and expected to get justice and get compesated soon. I have waited now over 9 years and am still waiting. Some people have been waiting 10 years or more and and still waiting to be compensated for personal injury caused by asbestos that produced by the Asbestos Industries.

By working real hard with my lawyer, in 1987 I received a parcel settlement from several asbestos producing companys and am still waiting for financial settlement and has been 9 long years. But I am, same as many others is being denied justice and compensation by the U. S. Justice Department and the Asbestos Industries.

There are hundreds of thousands of people like me that have had their healths or lives destroyed by asbestos, are still waiting to get justice and compensation for their personal injury caused by asbestos that was produced and sold as a safe product for public to use and to work and live with by the Asbestos Industries.

Theres no person or victim or their families, suffer more physically or financially then asbestos victim or the asbestos victim's family. Many times not only one person in a family has their health or life destroyed by asbestos caused disease or infection, but the whole family's has physical and financial problems cause by asbestos caused diseases and infections.

The average financial loss per victim is over $250,000 when made a victim. I have experienced it two time in my life. Once when my father was kill by lung cancer from coal dust and once when my brother was killed by leukemia cancer and I have asbestosis of the lung caused by asbestos.

Some people think a physical loss is not a financial loss, well tell you from experience that physical loss is a financial as much as any other kind of loss. How can anyone say physical loss is not a financial and has no financial value when the whole world gets its' financial value from people's healths and lives?

There is much more then just economic loss, that an asbestos has, it is the agony an asbestos victim has, knowing that is very little that be done to help the victim with miseries and pain the victim must suffer before the victim dies. Nobody suffers more than some of the victims do before they die.

Yet there are people that steal, cheat and destroy people's healths and lives just to make money. And that has been done by the Asbestos Industries.

Please do not punish the innocent people that have been made asbestos victims or anyother type victms and protect the wrong doers, the victim makers. Because that is what you are doing with the S. 1400 the "Product Liabilty Reform Act".

So in behalf of millions of people that have and will made asbestos victims and made to suffer and die in agony. Do not punish them anymore, help them and protect their rights to justice and compensation, that is rightfully theirs.

Stop the destruction of people's healths and lives with hazards products like asbestos and others. Make the people destroying people's healths and lives with hazardous products responsible for their wrong doing.

Thank you,

Senator **Bryan**. We thank you very much for your testimony, Mr. Safchuck. Mr. Cortese, we will hear from you last.

STATEMENT OF ALFRED W. CORTESE, ON BEHALF OF THE PRODUCT LIABILITY COORDINATING COMMITTEE

Mr. **Cortese**. Thank you very much. Thank you, Mr. Chairman. I am appearing today on behalf of the Product Liability Coordinating Committee, which is the overall business coalition supporting S. 1400. I would ask leave that my written statement be submitted for the record, and I would also like to thank the Chair and the staff, particularly, for the responsible manner in which this whole series of hearings has been conducted.

Senator **Bryan**. The statement, as you request, will be made a part of the record, Mr. Cortese.

Mr. **Cortese**. Thank you, Mr. Chairman.

It is obviously very difficult not to be sympathetic to the plight of people like Mr. Safchuck. I think, however, that the purport of his testimony reveals many flaws in the system that S. 1400 seeks to correct.

I think it also demonstrates very clearly why it is necessary that we have clear rules that place responsibility where it belongs. And obviously not only Mr. Safchuck should have the last word on that subject.

I think it is obvious that all parties to litigation, Mr. Safchuck and his members, as well as large and small businesses all have a right to equal justice. That is why I would like to focus for a few minutes on the objectives of S. 1400 to promote socially responsible conduct by fairly allocating the responsibility for harmful conduct. I think there are a number of the provisions of S. 1400 that accomplish that objective.

I believe in fact that each of the provisions of S. 1400 addresses that, at least in some way. The offer of settlement provisions and the alternative dispute resolution provisions in sections 201 and 202 give parties the opportunity to settle without the cost and time of trial. That obviously is one of the most important things that Mr. Safchuck is looking for. As a victim he is looking for quick settlement of his rights.

The product seller provisions in section 302 hold the distributor responsible for his own actions and impose liability on the distributor if the manufacturer is not available. I think that clearly places responsibility where it belongs.

Section 303 seeks to ensure that punitive damages are awarded only where truly merited and required to punish and deter reckless and egregiously unsafe behavior, not the kind of negligence that Dr. Wolfe was bandying about earlier, but egregiously unsafe behavior. That is the proper standard, and I think that the bill with its procedural protections places that in the proper context.

Section 304, the statute of limitations provision on the one hand, bars actions after 25 years in a very limited number of cases, while on the other hand it preserves all rights of action until the injury and its cause are discovered, which is an extremely pro-plaintiff provision. That is not the current law in most states in this country.

The workers compensation provision in section 305 places liability where it belongs, if it belongs on the employer, for example, and improves tremendously the efficiency and fairness of the product liability system and does not affect the workers compensation system.

These provisions have all been mentioned and covered by prior witnesses, and I would like to say a little more at a little bit further length about two particular provisions that I think specifically and most directly implicate individual responsibility. One is the drug/alcohol defense, section 307. I think that places responsibility squarely on the drug addict and the drunk for their own negligence and will prevent the shift of that responsibility onto society, onto consumers.

The provision, I believe, will go a long way to deter drug and alcohol abuse, and it is a clear signal to drunks and drug addicts that society is not willing to pay for their mistakes. As a matter of fact, substance abuse is responsible for half the highway deaths in the United States and half of the workplace injuries. It is an enormous problem, and I think that section 307 at least goes some way toward addressing that problem while maintaining a fair balance because it is, in fact, a modified comparative fault defense.

Now, let me deal at some length with the joint and several liability provisions in section 306. I think the importance of reform of joint and several liability has been recognized by the fact that two-thirds of the state legislatures have attempted to reform that doctrine. There are some 34 states that have addressed this issue legislatively. It appears to be the most popular reform and, in fact, some scholars were quite surprised at the speed at which that and other tort reform measures were adopted in state legislatures which were responding to the problems in the system.

Now, obviously if you have 34 different rules or 55 different rules, that does not do anything to help the manufacturer in terms of predictability or uniformity of the law, and that is basically what we have now. For example, we have a notebook filled with all of the various joint and several statutes that have been adopted in those some 34 states.

There are two interesting observations that Professors Henderson and Twerski have made on prior occasions. There are two reasons why they feel that the reform of joint and several liability has been so popular. Those legislatures have been unwilling to attack the underlying inequities of the system. So, like most State reforms; S. 1400 is a modest bill. As Senator Rockefeller pointed out, there are no caps on damages. There is no provision in this bill which deals with standards of liability that changes state law in that respect. There are no contingency fee provisions. There are no provisions restricting tremendously liberal discovery in State or Federal courts.

The bill deals with a few specific areas and joint and several liability is one of them, because joint and several liability—and this is one of the reasons it has been so popular in state legislatures—multiplies the unfairness of the tort system. Because when you have a basically unfair system to start with where it is so easy to obtain verdicts, where the verdicts are out of control, to hold a defendant responsible for far more than his proportionate share of the responsibility makes it immoral almost, if you will—at least some defendants feel it is immoral—to extend their liability to that extent merely for the purpose of shifting the cost from the victim to the manufacturer.

The other problem that Professors Henderson and Twerski pointed out is that joint and several liability permits the institutionally immune defendant to act with limited financial responsibility. For example, the inadequately insured motorist or the inadequately covered employer who escapes liability compounds the unfairness of shifting the losses to the deep pockets.

So what do we have? We have a system that has developed for a lot of different reasons—and my statement covers the history and the development and the purposes of joint and several liability, but we have got a doctrine that has broken loose from its original moorings. It is like a ship that has broken loose from the moorings of concerted action on which it was based in early English law; that has been buffeted by procedural joinder and other procedural devices invented to draw defendants together in one case, and that has crashed on the shoals of comparative fault and strict liability. When you have a defendant who is not responsible for a substantial portion of the liability contrasted with a plaintiff who is no longer barred because of his comparative fault but can recover some portion of his damages even if he is 99 percent at fault, you have, basically, a system that is terribly unfair.

The opponents of this very modest reform argue the advantage of full recovery to the victim. Obviously that is an advantage to the victim, and we have had some comments about whether plaintiffs are the only consumers. I think they are very frank to admit that the reason that you should not amend or change joint and several liability is because it forces settlement. Obviously it forces settlement. When a defendant who feels he has a sound defense on the law and the facts faces not only his own liability but everybody else's compounded in a situation and a system that already is unfair, what is he expected to do?

There are some that do hold out, but if they are found liable for even 1 percent of the judgment they must pay it all. The Walt Disney case that I cited in my statement is a perfect example where the plaintiff herself was responsible for significantly more of the accident than Walt Disney, but Walt Disney ended up paying I think it was approximately 75 percent of the verdict, even though they were held only 1 percent responsible. We feel that such a result is just not fair.

I do need to address the specific provision in the bill because I think that as applied today, joint and several liability destroys principles that equate responsibility with accountability, and it really exists for the purpose of finding the defendant with the greatest ability to pay. Now, let us face it. There are lots of cases out there that are brought only because of the institutionally immune defendant who cannot pay the verdict that would be expected or to fully compensate the victim; so society, through the court system, has chosen to shift that burden to the solvent defendant. What I am saying is we should at least move it back a little bit in the other direction.

Senator **Bryan**. Mr. Cortese, I do not mean to be rude and to interrupt you, but we are trying to limit the witnesses to a confined period of time so that the panel will have a chance to question. If I could get you to kind of wind it up by making any other point or points that you need to make very briefly, I would appreciate it, and I think the other panel would. And, as you have requested, your full testimony is included as a part of the record, and I am sure some of this may come out during the colloquy and the questioning period.

Mr. **Cortese**. Thank you, Mr. Chairman. I recognize the time is brief. Let me just mention two points with respect to the joint and several liability provision.

First of all, it is not eliminating joint and several liability entirely. It preserves the right of the plaintiff to full economic recovery, and that is true, and that is the uniform rule that would be applied in most states. There are some states that have eliminated joint and several liability for economic damages as well. But the only change that is made in this bill is that non-economic damages are eliminated under the doctrine of joint and several liability. That does not mean that the defendant, if he is responsible for some portion of those non-economic damages is not made to respond. He is. It is just that he does not have vicarious responsibility for everybody else's responsibility.

Mr. Chairman, I would like to conclude by saying that we know this is not a risk-free society. In a modern society innovation often entails some risk. The manufacturers shoulder that responsibility, and what we are asking is that the law should place the responsibility where it belongs, and I think that S. 1400 helps to do just that. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF

ALFRED W. CORTESE, JR.
CHAIRMAN, LAWYERS' COMMITTEE
PRODUCT LIABILITY COORDINATING COMMITTEE

This statement is submitted on behalf of the over 700,000 businesses and organizations across this nation that are committed to federal product liability reform and that are represented in that effort by the Product Liability Coordinating Committee. The Product Liability Coordinating Committee has several objectives related to federal product liability reform. First, we support reforms that will provide prompt and reasonable remedies to individuals injured by defective products. Second, we seek reforms that will give product manufacturers and sellers clear legal standards of liability to be applied when their products are evaluated in product liability actions. Third, we believe product liability law can and should provide incentives for manufacturers to produce technologically superior products and we promote reforms to create these incentives. Finally, we advocate reforms that will encourage responsible conduct by product users.

My remarks today will focus primarily on this last objective -- promoting socially responsible conduct by fairly allocating responsibility for harmful conduct. S. 1400, the Product Liability Reform Act pending before this Subcommittee, attempts to do just that. The bill would make several modifications to existing U.S. product liability laws in order to more fairly allocate legal and financial responsibility for product-related injuries to those who are responsible for the injuries. While I will briefly discuss this general theme, the balance of my comments will concern joint and several liability and the ways in which Section 306 of the bill would modify existing law to achieve a more equitable distribution of responsibility.[1]

Joint and Several Liability: The Law Today

One of the most disturbing effects of the rapid change in product liability law is its radical departure from the fundamental tenets of our civil justice system. One of these is the principle that we must each accept responsibility for our own conduct.[2] A second is the belief that it is unjust to hold people responsible for things they did not do.[3] A third is the conviction that the law should not be used to aid the guilty -- neither as a shield nor as a sword.

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[1] Section 306 would limit the doctrine of joint and several liability to economic or out-of-pocket losses, which include medical expenses, lost wages, and any other pecuniary losses allowable under the applicable state law. Thus, all defendants would still be jointly and severally liable for provable economic losses, but would only be severally liable, in accordance with the degree of their responsibility, for non-economic damages, such as damages for pain and suffering or loss of companionship and the like.

[2] Cf. Holmes, The Common Law 79-80 (1881) (discussing competing philosophies on how the law should apportion tort responsibilities among human actors).

[3] Holmes, supra note 2, at 95-96.

Joint and several liability, as applied in courts today, destroys these essential principles -- principles that equate responsibility with accountability in the way we do business and conduct our private lives. In fact, joint and several liability divorces responsibility for harmful conduct from accountability so effectively that joint and several liability now exists solely for the purpose of finding the defendant with the greatest ability to pay. At its best, joint and several liability is difficult to conceptualize and counter-intuitive; at its worst, it is grossly unjust and destructive. A brief review of the principles behind joint and several liability, its operation and its effects will demonstrate why this is so and why today's "deep-pocket" liability is so unfair.

Whenever the plaintiff in a lawsuit claims that more than one defendant is responsible for the harm, joint and several liability becomes an issue. The Restatement (Second) of Torts explains that under joint and several liability, as applied today, "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."[4]

Assume the plaintiff files suit against three defendants. If the factfinder renders a verdict against all three defendants, joint and several liability allows the plaintiff to collect the full amount of the verdict from one of the defendants alone, from any two defendants, or from all three defendants. Thus, the defendants

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[4] Restatement (Second) of Torts § 875 (1979).

> are liable jointly, in the sense that they may be forced by the plaintiff to share the liability, and also severally, in the sense that each is fully liable, on an individual basis, for the entire judgment. But the plaintiff can allocate the liability among and between jointly and severally liable defendants in any proportion he chooses. Indeed, the plaintiff may initially choose to bring action against only one, or any combination constituting fewer than all, of the defendants who may be jointly and severally liable . . . .[5]

At first blush, this seems to make sense because it ensures that the plaintiff will receive the full amount due under the verdict and the defendants can split the costs among themselves. Unfortunately, this rarely makes sense for three reasons. First, if one defendant can be forced to pay for all of the harm, the remaining defendants can escape responsibility entirely. They escape not because they are not responsible in fact and law, but because they may not be parties to the lawsuit, or they may lack sufficient funds to pay for the harm they caused. Consequently, joint and several liability allows some defendants to avoid the consequences of their own acts.

Second, joint and several liability does not impose costs on defendants in proportion to their fault in causing the plaintiff's injury. If defendant A only caused five percent of the harm, A could nonetheless end up paying for all of the harm if B and C don't or won't pay. This is manifestly unfair and contrary to the principle that it is unjust to hold people responsible for things they did not do.

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[5] Henderson & Twerski, Products Liability Problems and Process 46 (1987).

Third, joint and several liability permits a plaintiff, who is more to blame for his own injury than any defendant, to shift an unfair portion of the burden of responsibility onto a defendant who is less culpable than the plaintiff himself. Here, the plaintiff has abused the civil justice system, wielding it as a sword against the defendants and as a shield against accepting responsibility for his own conduct.

What message does this send to society about responsibility for injurious conduct? That the person who is most able to pay is the person who is most likely to be held responsible; that there is little correlation between actual responsibility and real-world accountability; that some people can get away with conduct harmful to others while others are saddled with burdens far in excess of what is fair and just.

But, as mentioned earlier, joint and several liability does ensure that the truly deserving plaintiff, injured through no fault of his own, is compensated. We are, after all, a compassionate society and it saddens and frustrates us to see others suffer needlessly -- as it should. This does not, however, justify imposing financial responsibility on someone merely because that person has a greater ability to pay -- this cost-shifting only results in two inequities instead of one. It follows with even more force that this result is unjustifiable when the mechanism we use to impose these costs is our civil justice system -- a system founded on the bedrock principle of equal justice for all.

While compensating injured victims is one goal of our product liability laws, it is not the only goal.[6] Other goals include the fair adjudication of disputes between manufacturers, sellers and buyers over products in commerce and the promotion of safe product design, manufacture and sale. Unfortunately, in our desire to compensate victims under principles of joint and several liability, we have frequently undermined the other two goals of the system.

As discussed above, joint and several liability rarely results in a truly fair adjudication of disputes because it tilts so heavily in favor of plaintiffs. In addition, it can hardly be said to promote the production of safer products because joint and several liability is used to circumvent actual fault in favor of imposing fault on the party most capable of paying. Thus, the manufacturer of an unsafe product, who has little or no assets, will be held minimally accountable. Consequently, that manufacturer, who has already demonstrated that he lacks the moral incentive to produce safe products, incurs no financial incentive to improve product safety either.[7] The distributor of the product, who had little or nothing to do with the product's safety, must bear the brunt of the judgment if he is financially able. Further, because the distributor engaged in no harmful conduct, but is liable only because he was the conduit through which the product reached the plaintiff, imposing full financial responsibility on the distributor does nothing to improve the safety of the product.

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[6] See P. Keeton & J. O'Connell, Basic Protection for the Traffic Victim 242 (1965).

[7] Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U. Cal.-Davis L. Rev. 1125, 1144 n.63 (1989).

Another problem of a more indirect nature involves the role of juries in complex, highly technical product liability cases. There is significant debate in the legal community about whether lay juries are capable of generally understanding and evaluating the highly complex information they must consider when deliberating in product liability cases.[8] Unable to confidently determine who or what caused the plaintiff's harm, juries find it much easier to simply apportion small percentages of liability among the multiple defendants based on very little evidence.[9] On appeal, the appellate court would have a difficult time reversing the jury because of the seventh amendment protection given jury verdicts and the very high degree of deference given to trial court findings of fact.[10] Consequently, a defendant in a product liability action involving multiple defendants not only faces a high risk of being forced to assume financial responsibility for more than his fair share of the harm, he also faces a high risk of being found liable in the first place.

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[8] Twerski, supra note 7, at 1139; see, e.g., Bendectin Cases Run Into a Wall, National Law J., May 7, 1990, at 1, col. 1 (discussing Ealy v. Richardson v. Merrell-Dow, No. 89-1189 (D.C. Cir. Mar. 9, 1990)).

[9] Twerski, supra note 7, at 1139.

[10] See, e.g., Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980) cert. denied, 450 U.S. 959 (1981).

Finally, one product liability scholar finds that doctrines like joint and several liability have an in-terrorem effect -- that is, they force truly innocent product manufacturers to settle claims out of fear.[11]

> An institutional defendant that believes it has a fully defensible case must think long and hard whether it can take the chance of litigating its innocence. The specter of ten percent liability is enough to thwart defendants with strong and legitimate defenses from engaging in litigation. For no liability may turn out to be ten percent liability, and ten percent effectively means 100% under [joint and several liability].[12]

Considering the significant legal costs involved in vindicating oneself through trial, as well as the potential liability costs under joint and several liability, some defendants understandably find that the only practical response to some lawsuits is a quick settlement without regard to actual fault. The net result is not safer products, but fewer products.[13]

To summarize, the present state of the law on joint and several liability promotes only one of the two goals of the product liability system; it distorts some of our fundamental societal values; and it has an unfair, harsh impact on defendants. A layperson might wonder how such a convoluted doctrine became part of our legal system in the first place. To help explain how joint and several liability evolved into the doctrine in use today, a brief history of joint and several liability follows.

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[11] Twerski, supra note 7, at 1139-40.

[12] Twerski, supra note 7, at 1139.

[13] See Mahoney & Littlejohn, Innovation on Trial: Punitive Damages Versus New Products, 246 Science 1395 (1989); Huber, Liability: The Legal Revolution and Its Consequences (1988).

The Historical Development of Joint and Several Liability

A look at the history of the doctrine of joint and several liability reveals that when the courts initially developed it, they intended it to serve a very legitimate purpose. From time to time, courts were faced with cases in which a number of individuals acting together, with a common purpose, inflicted a single injury on the plaintiff. In many cases, it was impossible to find that any one of the defendants had actually caused the plaintiff's injury, because the injury was indivisible in nature.[14] But, because the law at that time generally required the plaintiff to prove the cause of the injury, the plaintiff who was unable to do so was not permitted to recover.[15] This was a rather harsh result for the plaintiff and a windfall for the defendants. Further, because the plaintiff's injury was indivisible, it was impossible to apportion liability for the injury among the defendants in any meaningful manner.[16]

To avoid these seemingly inequitable results, courts reasoned that when "one person acts to produce injury with full knowledge that others are acting in a similar manner and that such conduct will contribute to produce a single harm,"[17] it made sense to treat each defendant as if he was the sole cause of all the harm.[18] Thus, each defendant was liable jointly, as a member of the group that acted in concert to cause the harm; and severally, as an individual who was the sole cause of the harm. This was the substantive law of joint and several liability.

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[14] Harper, James & Gray, 3 The Law of Torts § 10.1, p. 5 (1986).

[15] Harper, James & Grey, supra note 14, at § 20.4.

[16] Id. at § 10.1.

[17] Id.

Quite apart from the substantive law of joint and several liability was a rule of procedure that provided that when the plaintiff had a single cause of action, alleging that multiple defendants acted in concert to produce a single harm, such that the substantive law of joint and several liability would apply, then and only then was it permissible for the plaintiff to join each of the individuals who acted in concert as defendants in the action.[19] Over time, courts recognized the value of hearing all related claims in one trial, and decided to expand the rule of procedure regarding joinder to permit "joinder of defendants who were necessary to the complete determination of settlement of the questions involved therein.'"[20] This expansion of joinder, however, was completely unrelated to the substantive law of joint and several liability. Instead, it reflected a desire to increase the efficiency of trial for the court and the parties generally.[21]

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[18] Id.

[19] Id. at §10.1, p. 7.

[20] Harper, James & Grey, supra note 14, at § 10.1, p. 8 (citing to Clark, Code Pleading 382 n. 151 (2d ed. 1947)).

[21] Id. at 9.

The lack of connection notwithstanding, for reasons of efficiency courts soon began to erroneously apply the substantive law of joint and several liability in cases where expanded joinder was permitted.[22] Thus, over time joint and several liability was applied in cases where there was no concerted action by the multiple defendants.[23] As more states enacted rules that expanded joinder, courts continued to erroneously apply joint and several liability in an increasing number of situations.[24]

Before too long, joint and several liability was no longer tied to the concept of concerted action, nor was it used solely to prevent the plaintiff's case from being dismissed -- the original purposes for which the doctrine was developed. Instead, joint and several liability was being used to shift the risk, that one defendant would be unable to pay, from the plaintiff to the remaining defendants.[25] This was a blatant bastardization of the doctrine that cannot be explained as a mere extension of the original legal reasoning. This transformation also presents another example of the judiciary's incursion into policy-making, an area legally and traditionally within the power of the legislature alone.[26]

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[22] "The error that joinder was tied to substantive liability illustrates the confusion over the relation between the two concepts. This confusion arose from an inability of some courts to conceive of the two as separate and distinct legal tools, each having its own function." Harper, James & Grey, supra note 14, at 10.

[23] Id.

[24] See Keeton & O'Connell, supra note 6 at 375.

[25] See Twerski, supra note 7, at 1143-44.

While joint and several liability certainly is not the only legal doctrine to be cut loose from its doctrinal moorings, it has drifted farther away from those moorings than most. This is due to its collision with another change in legal doctrine, a change that was also intended to vitiate the harsh effects of another tort doctrine on plaintiffs -- contributory negligence.

Under principles of pure contributory negligence, a plaintiff whose own negligence contributes to his injury, regardless of the degree of contribution, is completely barred from recovering against any defendants who may have also contributed to the injury.[27] Even if the plaintiff's negligence is minimal the plaintiff cannot recover.[28] Because of this harsh result, courts started to move from pure contributory negligence to a doctrine called comparative negligence or comparative responsibility.[29]

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[26] Id.

[27] Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824) (first American case applying contributory negligence); Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (K.B. 1809) (earliest recognized contributory negligence case in England).

[28] "[I]f plaintiff's negligent conduct contributes to his injury, to any degree, his claim is barred, even if the other party may have been negligent to some degree." Hale v. Bethlehem Steel Corp., 335 F.Supp. 559, 562 (N.D. Ill. 1971); 65A C.J.S. Negligence § 130b (1966).

[29] See, e.g., Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973) (Jasen, J., concurring) ("Our decisions have presaged a change to a system of comparative fault. . . . In my opinion, the time has come to take that step."). Though comparative (continued...)

Under comparative negligence, courts look at the conduct of both the plaintiff and the defendant. The plaintiff's recovery is reduced by the degree of the plaintiff's contribution to the injury, but the right to recover is never eliminated.[30] Even if the plaintiff is ninety-nine percent at fault, the plaintiff can still recover one percent from the defendant.[31] Some jurisdictions have modified comparative fault, finding it unreasonable and unfair to allow a plaintiff who is more than fifty percent at fault to recover from a less responsibite defendant. Under modified comparative fault, as long as the plaintiff's contribution to his own injury is less than that of the defendant, comparative negligence permits the plaintiff to recover.[32]

While joint and several liability and comparative fault each work to the detriment of defendants when applied, that detriment pales when compared to the outrageous result that follows when the two doctrines are applied together. For example, Walt Disney World Co. v. Wood,[33] a young woman was injured when her fiance struck her bumper car from behind while they were at Walt Disney World. After trial of her suit against the amusement park and its insurer, the jury found the

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[29] (...continued)
negligence fault is used in this paper, it is generally more accurate to refer to comparative responsibility in the strict liability context.

[30] Henderson & Twerski, supra, note 5, at 318-19.

[31] Id.

[32] Henderson & Twerski, supra note 5, at 319-20.

[33] 489 So.2d 61 (Fla. App. 4 Dist. 1986), aff'd, 515 So.2d 198 (Fla. 1987).

woman's fiance eighty-five percent at fault, the woman fourteen percent at fault, and Disney only one percent at fault. Florida recognizes comparative fault, which meant that even though the woman was more responsible for her accident than Disney, the woman was still able to recover. Even more outrageous, Disney was held jointly and severally liable for the fiance's share of fault as well, bringing its total liability to eighty-six percent of the $75,000 judgment. The Florida Supreme Court upheld the judgment on appeal.[34]

When courts adopted comparative fault, it was to avoid the all-or-nothing effect of contributory negligence, which barred any recovery by a plaintiff guilty of any degree of fault. Yet, joint liability operates on a similar all-or-nothing basis. It imposes all of the liability on a defendant who may have almost none of the responsibility. Clearly, this is just as unfair to the defendant as contributory negligence was to the plaintiff. Nonetheless, there has been little or no movement by the courts to eliminate joint and several liability, even though defendants are as entitled to fair and just treatment as plaintiffs.

Recognizing these inequities, over two-thirds of the states' legislatures have acted to reform the doctrine of joint and several liability.[35] As one scholar commented about these changes and others, "[i]t is fair to say that no one foresaw

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[34] Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987) (three judges dissenting).

[35] Twerski, supra note 7, at 1125 n. 1.

in advance that state legislatures would act so swiftly or decisively. . . ."[36] In fact, eleven states have abolished joint and several liability,[37] and twenty-three have modified it.[38] Only sixteen states have not modified or abolished joint and several liability.[39]

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[36] Id.

[37] The following states have abolished joint and several liability completely, including its original application: Alaska, Alaska Stat. § 09.17.080(d), amended by Ballot Measure No. 2, Init. No. 87TOR2, approved by voters Nov. 8, 1988 (Feb. 6, 1989); Indiana, Ind. Code Ann. § 34-4-33-4 (West Supp. 1988); Kansas, Kan. Civ. Proc. Code Ann. 60-258a (1984); Kentucky, Ky. Rev. Stat. Ann. § 411.182 (Michie 1988); Utah, Utah Code Ann. § 78-27-40 (1986); Vermont, Vt. Stat. Ann § 12-1036 (1980); and Wyoming, Wyo. Stat. § 1-1-109 (1987). Other states have retained the concept as it applies to concerted action, but have abolished it for all other purposes: Arizona, Ariz. Rev. Stat. § 12-2506 (1988); Colorado, Colo. Rev. Stat. § 13-21-111-.5 (1987); Idaho, Idaho Code § 6-803 (1989); North Dakota, N.D. Cent. Code § 32-03.2-02 (1987).

[38] The doctrine has been modified in California, Cal. Civ. Code §§ 1431, 1431.1, 1431.2 (West 1987); Connecticut, Conn. Gen. Stat. § 52-572h (1987); Florida, Fla. Stat. Ann. § 768.81 (West 1987); Georgia, Ga. Code Ann. § 51-12-33 (1988); Hawaii, Haw. Rev. Stat. §§ 663-10.9, 9.01 (1989); Illinois, Ill. Rev. Stat. Ch. 2, para. 1117 (1986); Iowa, Iowa Code Ann. § 668.4 (West 1987); Louisiana, La. Civ. Code Ann. art. 2324 (West 1989); Michigan, Mich. Comp. Laws Ann. § 600.6304 (West 1989); Minnesota, Minn. Stat. Ann. § 604.02 (West 1989); Mississippi, H.B. 1171 (July 1, 1989); Missouri, Mo. Ann. Stat. § 537.067 (Vernon 1989); Montana, Mont. Code Ann. § 27-1-703 (1989); Nevada, Nev. Rev. Stat. Ann. § 41.141 (Miche 1987); New Hampshire, N.H. Rev. Stat. Ann. § 507:7-e (1989); New Jersey, N.J. Stat. Ann. 2A:15-5.3 (West 1989); New Mexico, N.M. Laws 1987, Ch. 141 § 41-3A-1 (1987); New York, N.Y. Civ. Proc. L & R § 1601 (McKinney 1987); Ohio, Ohio Rev. Stat. Ann. § 2315.19(d) (Anderson 1988); Oregon, Or. Rev. Stat. § 18.485 (1987); South Dakota, S.D. Codified Laws Ann. § 15-8-15.1 (1989); Texas, Texas Civ. Prac. & Rem. Code Ann. §§ 33.013, 41.005 (1987); Washington, Wash. Rev. Code Ann. § 4.22.070 (1986).

[39] Those states that have not legislated reform of joint and several liability as of the date of this hearing include: Alabama, Arkansas, Delaware, Maine, Maryland, Massachusetts, Nebraska, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

States that have enacted reforms have adopted a variety of different solutions. Some states, like California, have adopted the change proposed in Section 306 of S. 1400, that is, they have abolished joint and several liability for non-economic damages.[40] Other states have eliminated joint and several liability except in cases where the damages would be otherwise uncollectible, in which case, the unsatisfied portion of the judgment is reallocated to the remaining defendants in proportion to their percentage of liability.[41] Still other states have abolished joint and several liability when the plaintiff is in some degree contributorily negligent.[42] Several states have capped the percentage of damages for which the defendants will be jointly and severally liable, [43] while others have established a threshold of liability, below which a defendant cannot be held jointly and severally liable.[44] There are many other variations on these basic themes, but due to the complexity and large number of laws involved, it is not practicable to discuss them fully here.

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[40] Compare Cal. Civ. Code §§ 1431, 1431.1, 1431.2 (West 1987) with S. 1400, § 306, 101st Cong., 1st Sess. (1989).

[41] See, e.g., Conn. Gen. Stat. § 52-572h (1987); Mich. Comp. Laws Ann. § 600.6304 (West 1989); Mo. Ann. Stat. § 537.067 (Vernon 1989).

[42] See, e.g., Fla. Stat. Ann. § 768.81 (West 1987); Ga. Code Ann. § 51-12-33 (1988); N.Y. Civ. Proc. L & R § 1601 (McKinney 1987).

[43] See, e.g., Mississippi, H.B. 1171 (enacted July 1, 1989); S.D. Codified Laws Ann. § 15-8-15.1 (1989).

[44] See, e.g., N.D. Cent. Code § 32-03.2-02 (1987); N.J. Rev. Stat. Ann. § 507:7-e (1989).

In fact, the complexity of and substantial variation in reform legislation from state to state have created a significant problem. Because of the wide range of positions on joint and several liability currently represented in the fifty-plus state laws, a manufacturer involved in interstate commerce has no way to accurately assess his potential liability in general, and much less of an opportunity to understand his liabilities from state to state. While we are pleased that so many state legislatures appreciate the plight of manufacturers under joint and several liability, keeping track of how these legislatures are expressing that appreciation is impossible. Here, only Congress itself can provide an effective solution, and that solution lies in Section 306 of S. 1400.

How S. 1400 Modifies Joint and Several Liability

The PLCC believes that the surest, fairest way to eliminate the injustice caused by joint and several liability is to eliminate use of the doctrine altogether, as eleven states have. Because of the critical need for relief at the federal level, however, we support the joint and several liability provisions of S.1400 which are similar to those enacted in California. As previously stated, California has eliminated joint and several liability for non-economic damages only, as would Section 306 of S. 1400. We strongly urge this Committee to favorably report this provision, as well as the balance of S. 1400.

Section 306(a) is a good start at addressing reform in one of the most needed areas of joint and several liability -- noneconomic damages. Of all the damages for which a defendant can be held accountable, noneconomic damages are the most troubling because they are intended to compensate for an amorphous collection of human needs, emotions and vanities. The human species collectively has not yet been able to agree on a single meaning for such vast concepts as companionship, reputation or suffering. Yet, product liability plaintiffs routinely calculate the value of these losses with great precision, based on mortality statistics, adjusted for inflation, plus interest, and reduced to present value. And defendants are expected to pay these frequently enormous sums without proof, without verification, without any objective measure of the accuracy of the calculation.

While payment for these types of damages is troubling to a defendant generally, a defendant who is liable for noneconomic damages by virtue of joint and several liability is morally outraged at this unjust result. Under section 306(c)(1) of S. 1400, defendants would be relieved of joint and several liability for the following elements of damage: subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

We need to make it clear that under section 306(a), however, defendants are still severally liable for noneconomic damages. Several liability for noneconomic damages will be imposed in direct proportion to each defendants' percentage of responsibility. Further, section 306(b) requires the trier of fact in each case to determine the proportional share for each defendants' contribution to the harm.

Thus, section 306 restores the relationship between responsibility for the harm and subsequent accountability. Section 306 does not relieve the defendant of provable liability for subjective harms, like pain and suffering -- it only relieves him of vicarious liability for the injurious conduct of others.

Another critical point to bear in mind about section 306 is that is preserves joint and several liability for all damages that are objectively verifiable. These latter damages, called economic damages in the legislation, cover all objectively verifiable monetary losses, including, but not limited to, medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, rehabilitation and training expenses, loss of employment, or loss of business and employment opportunities. While this keeps defendants subject to the injustice of assuming liability for the fault of others, at least it is possible to calculate this liability in a reasonably objective, verifiable manner.

To summarize, section 306 carves out only one exception to today's law of joint and several liability -- its application to noneconomic damages. It leaves the balance of the doctrine alone. Yet, because the coupling of noneconomic damages with joint and several liability works an egregious inequity on every defendant subjected to it, this one change alone is significant. The enactment of section 306 will be a significant action toward increased fairness in product liability litigation. Further, it will signal the start of the process by which we may once again reaffirm our conviction as a society that the individual who engages in harmful conduct will be forced to assume responsibility for the results of that conduct.

How Other Provisions of S. 1400 Reestablish The Link Between Responsibility and Accountability

The values underlying section 306's modification of joint and several liability are also reflected in other provisions of S. 1400. For example, under current law, product sellers who have no involvement in the design or production of the products they sell can nonetheless be held vicariously liable for injuries caused by those products. Section 302 of S. 1400 would limit the liability of product sellers to those situations where they actually had some responsibility for the harm caused by a product. Section 305 will force negligent employer's to assume responsibility for harm their negligence causes to their employees. Both of these provisions place responsibility where it belongs -- on the individual who actually caused the harm.

Another provision of the bill emphasizes these same principles, but with regard to an issue that threatens the continued advancement of our society from within -- drug and alcohol abuse. Although the individual who abuses drugs or alcohol is engaged in self-destruction, that individual's conduct also threatens the rest of society as well. The self-destruction occurs in a sometimes visible and always predictable manner. The threat to society, however, is not always as clear.

Society pays for these people bent on destruction in a variety of ways -- increased crime in the streets; the withdrawal of potentially talented, capable people from the mainstream; the diversion of government resources from productive activities to activities directed at controlling substance abusers; and more. We have assumed responsibility for the consequences of this harmful conduct and it will never end until we thrust the responsibility back on those that should bear it.

Some segments of society have started to do just that. The state of Washington, for example, has enacted a law that bars recovery in tort to an individual who is injured because of his own intoxication. Washington enacted this statute inter alia to "create a more equitable distribution of the cost and risk of injury . . . ."[45]

Section 307 of S. 1400 would create a similar provision, but would make it applicable across the entire nation. Under section 307, a claimant who is injured because of his own intoxication while using a product, would be barred from recovering for that injury from the product manufacturer or seller, provided the claimant is more than fifty percent responsible for the accident or event that resulted in the injury. Further, this defense would not be available if it would result in imposition of liability on someone other than the product manufacturer or seller, such as a municipality or other governmental entity.

Enactment of this provision would place the responsibility where it belongs -- on the substance abuser. It would lessen the "tax" society pays for the harm these individuals inflict by refusing to subsidize it any longer. When a manufacturer incurs excess costs paying liability claims, those costs are generally passed on to others. Product prices may be increased, employee wages may be frozen, research and development can be slowed, production is reduced, and a seemingly endless ripple effect occurs throughout society. All of these results flow from one individual bent on self-destruction. When we multiply these results by the number of substance abusers, the total costs are obscene.

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[45] Wash. S.B. No. 4630, Sec. 100.

In addition, section 307 would prevent the substance abuser from practicing one other type of abuse -- abuse of our civil justice system. When we allow substance abusers who injured themselves, and possibly others, to use those courts to obtain compensation for their destructive acts, we exacerbate the problem. The justice meted out in our courts should not be available as a refuge for substance abusers to hide behind. Neither should the beneficence of our judicial system be turned against society as a weapon. Yet, this is the tragic result under current law. Clearly, substance abusers need help. But before society extends help, the individual seeking it should first be required to demonstrate a willingness to help himself. Under our Constitution, the Congress is charged with allocating risk among the various components of our society. Right now, the risks from substance abuse are high and they are distributed unfairly. Only Congress can redistribute these risks in a way that will benefit the nation as a whole. Congress is addressing these risks in the area of criminal law and we support those efforts. Unfortunately, the effects of substance abuse are so pervasive that congressional intervention is needed to redistribute these risks in the private sector as well.

Section 307 of S. 1400 provides an opportunity to act now, and in a way that will limit the harm substance abuse indirectly inflicts on society. Enactment of this proposal, along with others currently pending before other congressional committees, is important and can make a difference. The alternative to the action we propose is grim and without hope of improvement on its own.

Senator **Bryan**. Again, I thank you very much, as does the subcommittee, Mr. Cortese, for your testimony and comment. I will begin the round of questions and try to be brief.

One of the sidebar diversions of the previous panel, both Ms. Lipsen and Dr. Wolfe were questioned by a number of members of the subcommittee very intensely, that there was a consumer group and that they had worked in concert; three, four, five or more together did so. I must say I do not find that pejorative or in any way the subject of which adverse inferences should be drawn or in any way that left the hearing that we have structured imbalanced.

In that sense I want to just make the record clear on this. Mr. Schwartz, as I understand it, you made it very clear, sir, that you are part of the Product Liability Alliance. You are right up-front about that, and it is equally clear that the Product Liability Alliance is a participating member of the Product Liability Coordinating Committee.

Mr. **Schwartz**. That is correct.

Senator **Bryan**. And I find nothing pejorative about that either, and I am just trying to put some structure or balance into this, Mr. Cortese. You appear here as a witness for the Product Liability Coordinating Committee, and I believe that, Mr. Henderson, you too appeared here as a witness. The Chair finds nothing inappropriate, but I think the record would be incomplete if somehow there was a suggestion that there was just a group of consumer groups that are loosely structured, and they are here to make their testimony, and we are hearing from the same person in effect three or four times. Each of them had different points of view, as did each of you, and I think that is the state of the record.

Let me ask you, Mr. Cortese, first, if I may about the alternative dispute resolution. I understand what that is supposed to accomplish, but I have some difficulty understanding how that is going to work out mechanically. Have you had a chance to look at that? I know that was not the focus of your testimony, but you are a gentleman that has been in the trenches a long time on this and clearly are a more acknowledged expert than I in looking at that. But I am just not clear, although Mr. Henderson tried to address that question, and I appreciate that, I am just not sure how that works in terms of its timeliness. When does that come in? In other words, at what point in time is that issue resolved?

Mr. **Cortese**. Mr. Chairman, I believe the way that would operate, obviously the provision is designed to be as modestly invasive of State law as possible, because there are a variety of methods of alternative dispute resolution, most of which have been tried in most of the States. It is designed to permit a structure that the State can adhere to, and it is based—basically the Section 202 is based upon the offer of settlement procedure of the Federal Rules of Procedurer.

Senator **Bryan**. I understand. That one is pretty clear. That is a procedure that parallels many of the civil practice acts in a number of states, including the Federal Code of Civil Procedure, as I recall, which has been adopted, as you know, in one variation or another in a number of states, but I am not quite sure how the alternative dispute resolution works mechanically, even assuming that it is not invasive, or is minimally invasive. When is that decision made? How, mechanically, does that work?

Mr. CORTESE. Well, I think, Mr. Chairman, that what would happen is that an offer of settlement can be made at any time during the course of the litigation and an offer to submit the matter to alternative dispute resolution can also be made at any time during the course of the litigation.

Now, if that offer is made by the defendant or the plaintiff, then that triggers a response in the other party, and if it is found ultimately after trial, probably, or after disposition, that that was not in good faith or made without good cause, then the party is subject to the sanction in the statute. That is intended to operate as a carrot and a stick to at least require the parties to consider the alternative of alternative dispute resolution so that we can have some structure throughout the country that would bring the attention of the parties to that method.

Senator BRYAN. Mr. Schwartz, do you want to take a stab at the offer of judgment? That seems to be a fairly clear-cut standard there. If you do not recover more than the offer of judgment, as I understand it, that in effect costs and attorneys' fees would be awarded in the favor of the defendant who tenders such an offer of judgment, and so that seems to me that is pretty clear, and I understand that.

I am probably the only one in this whole room who does not fully understand at what point and by what standard the other mechanism that you have provided in this bill, namely the alternative dispute resolution. I recognize that there are a number of provisions in State law on this mechanism and accept the part that it is probably a desirable thing to have, rather than going to the court for every provision. However, I am trying to understand how it works or is going to work under this bill? How does that work?

Mr. SCHWARTZ. Well, first, in terms of where this provision came from, this was developed by the Senators on the Committee, I think, over the course of the history of this bill. There are some things that are in this bill that the business community, or the various coalitions we work for, strongly desired. Many of those things, as I said earlier, were taken out to accommodate the demands of consumer groups. This provision did not evolve from the business community but developed in the course of hearings, because some Senators, thought correctly that the bill should not only deal with substance, but also try to expedite claims. I think it is unclear as to when the procedure takes place, and I think it would benefit from an amendment that would clarify the timing. I find it unclear, also, Senator.

Senator BRYAN. Well, I guess that is two of us in this room, and I thank you for your candor, Mr. Schwartz, and now I would yield to Senator Kasten.

Mr. SAFCHUCK. Can I make one statement, that should be very important in this?

Senator BRYAN. Mr. Safchuck, does it relate to the question I just asked the witness?

Mr. SAFCHUCK. No, it is a question to the relation of what it forces the asbestos victim or any other victim to do. What has been discussed here is trial lawyers. By instituting that, you are forcing the victim to hire a lawyer, because it makes it so complicated that he cannot understand and fully do what is necessary to be compensated, so that it is very difficult.

Senator **BRYAN**. Mr. Safchuck, I misspoke my comment. Senator Rockefeller is next, then Senator Kasten. I apologize to Senator Rockefeller.

Senator **ROCKEFELLER**. No, not at all. Mr. Schwartz, I would like to get you to reflect on Mr. Safchuck's situation.

There is no way this bill would deny any rights to victims or limit their ability to seek redress for their injuries with respect to joint and several, with respect to being compensated fully for economic damages which would happen under S. 1400, or the percentage or their recovery, as you have observed it, or Mr. Cortese, as you have observed it over the years, in a case like asbestos. I am very familiar in West Virginia with Black Lung, and this is similar in many ways.

I want to know the percentage and how costly is the economic damages and let me finish the question. I want to know the percentage of what the economic damages are, which are fully done under S. 1400, as opposed to the noneconomic damages, which would be stressed in other areas, and then of course some States, I presume, would allow for punitive damages, depending on their State's laws.

Now, how would you describe the effect of this bill or five percent of economic damages. I agree, and can sympathize with Mr. Safchuck. He is waiting all these years, and 96 percent of these things, at least it used to be a couple of years ago are settled out of court anyway, and the guy has got to wait forever. Because of the lack of an expedited claims settlement system he has got to wait forever. He is furious, he is frustrated, and he ought to be.

Now, in your experience or Mr. Cortese in your experience, how does this effect the percentage, let us say of the economic damages that is, and let us say, making sure that he gets the medical attention that he is fully due and gets fully under S. 1400 as opposed, let us say, to stress, noneconomic, which he gets in proportion to that company which accepts responsibility, and I will add one more caveat on there? With asbestos, I assume a lot of companies are going out of business, and therefore it is very important for him to be able to cover some noneconomic damages. It is very important for him to be able to do that. If everybody goes out of business, he is going to have a very hard time recovering anything.

Now, I mean, I agree with Mr. Cortese. If a company is responsible for 1 percent and gets hit with 100 percent—I mean, I think that is sensible. On the other hand, you want to make sure that Mr. Safchuck does get justice under this.

Respond to me on how you feel that S. 1400 does in fact allow past and full recovery in these cases? I will be honest and say upfront that I do not think probably Mr. Safchuck, and no disrespect to him, probably has read this bill. I mean, he is mad and he has every right to be, and I want to make sure that he gets faster service. Can you kind of help me on that?

Mr. **SCHWARTZ**. Yes. Let me begin to say that the first problem that Mr. Safchuck would have in some states today is that he could lose his right to sue before he discovered that he was injured because the statutes of limitations in some states are more restrictive than section 304 in S. 1400. S. 1400 would preserve his claim until he discovered not only that he was harmed, i.e. that he had a lung illness, but also that he knew the cause of that harm. With asbestos victims that can often be a very substantial time. It would open up the courthouse doors in some of our States to his claim.

Second, once it opened up the courthouse doors, it would give him two weapons that he does not have, in some States, to force the defendant to come to the settlement table. First, he could make a reasonable offer of settlement, and if it were refused he would be able to impose on the other side the legal costs that he would endure if he had to pursue his claim.

In section 201, S. 1400 incorporates Federal Rule 68. It is a weapon that he does not have today.

Senator ROCKEFELLER. By that you meant that under the present law, in certain States, that at the point of discovery is not mentioned, that his time would have long-since run because by the time it was discovered what he had, either by him or by a doctorthe time would have run?

Mr. SCHWARTZ. A few states have a "time of injury" rule. More states have a disovery rule, but one can get tripped up under some of them because the statute begins to run when you discover or should discover your "harm", S. 1400 extends this time until he knows is both his harm and its cause.

He can also invoke an alternative dispute resolution procedure—let us say there are court dockets backed up four or five years. He can say, I want to submit this to ADR, and it certainly would seem to me to be a reasonable request if you show that the court dockets were backed up. ADR is an informal procedure to resolve his claim. If the defendant opposed that, one could argue the defendant did not act in "good faith". If the request were successful, the defendant would have to pay Mr. Safchuck's legal fees.

With regard to damages, it should be noted that asbestos victims suffer very substantial economic damages. Sometimes it is death. Frequent somebody has lost a loved one who was the principal provider of the home. Other times, it is severe, work-crippling injury. The man or woman cannot work any more. So you have loss of wages plus very substantial medical costs. So in the asbestos cases, economic losses are a very key, principal part of the claim.

S. 1400 does not abolish economic losses under joint and several liability. Let us take an asbestos defendant who was found by a jury to be only 1 percent at fault. Under S. 1400, Mr. Safchuck could collect his full and total economic losses from that 1 percent at fault defendant.

Now, as you suggested, Senator there have been a number of asbestos companies that have gone into bankruptcy. To some extent there can be a domino effect with bankruptcies and asbestos companies. Let me explain. As each asbestos company tumbles into bankruptcy, the remaining defendants may remain responsible for the whole ball of wax under the doctrine of joint and several liability. As you have fewer and fewer defendants, the impeach of full joint and several libility becomes greater.

If you impose total joint and several liability including the pain and suffering, you accelerate the domino effect of bankruptcies.

This could lead to a situation in the late 1990s where there are no companies left and people do not recover their basic economic losses. So I think that S. 1400 joint and several liability provision actually goes to the very reason we have joint and several liability in the first place: to assure that innocent victims receive basic compensation.

Let me explain. The reason we impose total liability on a 1 percent defendant is not because that defendant is at fault. A jury has found him 99 percent not at fault. Courts impose joint and several liability because they believe that defendant is better able to absorb the cost of the risk than the victim is able to absorb it. This theory is called risk distribution.

But risk distribution works best with economic losses, which are part of any risk distribution system like health insurance, Social Security, no fault auto. All of those provide recovery for economic losses, but not for pain and suffering. In sum S. 1400 joint several liability provision goes right to the reason for the rule. Mr. Safchuck, under S. 1400, would not be put in a worse position but a better one.

Now, I can understand his feeling, his very, very, very strong feelings, but if he took the time—and it is not easy to go through the legal prose, which is always somewhat turgid, but if he looked through the bill and looked at the actual provisions, he would see the result of your efforts and other senators on this Committee. This bill has been cleared of obstructions that are unfair to victims. That is my basic point.

Senator ROCKEFELLER. Mr. Chairman, that is the end of my questioning. I would once again repeat my hope that not only members of this Committee but those generally involved in this as a whole will in fact look at the bill and will look at it very carefully, and that we will all cast aside, sort of previous complaints, frustration, et cetera, because that is a disservice to the actual text of this bill, and the balance that it attempts to strike.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Rockefeller. Senator Kasten.

Senator KASTEN. Mr. Chairman, thank you. I am going to be brief. All of us have had a busy day already, and I see that we have a hearing—a Committee meeting to begin in ten minutes in this room, as well.

Mr. Wilcox, on page 3 in your prepared testimony you refer to Professor Arthur Larsen and his latest treatise on Workers Compensation law, which is most appropriate and should be carefully observed, and you take that couple of paragraphs out.

It has been pointed out to me that that is not the latest treatise, and we have been going back and forth on this set of issues, because they are, as you have pointed out and as Mr. Schwartz pointed out, very complicated. Are you aware of the fact that there is a 1990 edition of Professor Larsen's treatise?

Mr. WILCOX. If there is, I would like to see it.

Senator KASTEN. We basically tried to follow it in the legislation, the 1990 version, and I know that Mr. Schwartz and others have been involved in this, but in effect we built on his later one, and I would like for you to comment on this point briefly, and then I am going to ask Mr. Schwartz to comment on this point briefly, and I just basically want to get it cleared up.

Mr. WILCOX. Senator Kasten, now that I see this piece of paper which refers to section 96.92(c), it is almost the identical provision that was in the 1988 version. The 1988 version from which we quote has a section that follows 76.92(c). That is the section I quoted.

Dr. Larsen did propose three possible solutions to the conflict between the tort and the no-fault system, but he ended up in the next section by saying you think I have taken you to Valhalla. I have not. There is a problem, and that is where the quote that we put in our statement--it is the next following section.

Senator KASTEN. So what you are saying to me, then, is that the 1990 version is insignificantly different from the 1988 version? We are looking at different parts. That is not a substitute for what you have.

Mr. WILCOX. The volume that we looked at is a total treatise by Professor Larsen on third-party claims, third-party actions and the conflict between systems. He proposes three different solutions to take care of this, one of which he refers to is from a professor—I think his name is Miller—in 1972 from the University of Wisconsin.

Well, then that solution when you had two conflicts or two systems in conflict is to split the difference between the two. I am an employer and you are a manufacturer. I am 50 percent at fault, you are 50 percent at fault. Give Professor Schwartz his 100 percent. But you pay 50 percent of the legal damages and 50 percent of my compensation and I pay 50 percent of your legal damages.

Now, that was one of the suggestions that was rejected. There have been many suggestions going around in this area for the last ten years, and nobody has yet come to a conclusion. All we are saying is that current public policy says do not mess around with the compensation system.

Senator KASTEN. Let me just ask Mr. Schwartz to reply briefly to my question, and we might want to work with some questions for the record that we have in this area. This is a complicated area. We do not want to have in effect double recovery. At the same time we do not want to be in a position where we are limiting people's recovery. This has been a complicated and contentious section of this legislation since we began.

Mr. WILCOX. Well, the debate between us as to who ends up paying the bill does not affect the injured worker at all. He gets 100 percent. It is just a question of who is going to end up paying the tab.

Mr. SCHWARTZ. Throughout the years when Professor Larsen testified here and in his latest edition he supports the solution reflected in Section 305. It is one that he invented. People have turned to him for that solution. Larsen on workers comp. is the standard text in the field.

He admits that his solution is not trouble-free, but of all the different alternatives, he thinks it is the fairest. He feels that employers are given a protection under his solution because contribution and indemnity claims by manufacturers in suits are prohibited. That manufacturers are given some protection because they are able to avoid paying the subrogation lien, and employees, as Mr. Wilcox and I agree, are in the same place they are today and get a full recovery.

But I think it is something that we should try to work out. We cannot do it this afternoon, but we can. Where Mr. Wilcox and I are going to keep talking to one another and see if we can find areas of agreement.

Senator **KASTEN**. I just want to say that I appreciate Mr. Wilcox's testimony and participation here. These are issues that we can focus on in a positive way and I am satisfied that our solution is one. But I am not satisfied that our solution is the only one.

Mr. **WILCOX**. Well, speaking selfishly for my industry, I think you were correct in 1986, but there are other industries who do not have the same benefit that we have enjoyed up until now.

Senator **KASTEN**. Mr. Chairman, thank you.

Senator **BRYAN**. Thank you very much, Senator Kasten. I would like to thank each member and, Mr. Safchuck, I am afraid we are going to have to conclude this because this room is—scheduled for another hearing.

Mr. **SAFCHUCK**. What you are doing is protecting the industry, and absolving the victims totally.

Senator **BRYAN**. That certainly is not the purpose of this subcommittee Chairman. We appreciate all of you coming and testifying. Your testimony is very helpful. We appreciate the participation of the subcommittee and the interest expressed.

The record will be held open for another two weeks so that anybody who wishes to ask further questions please ask the witnesses if they would respond promptly so they we may get those responses in the record, I would ask those in attendance if they would clear the room promptly because there is another committee hearing scheduled in this room at 2:00. The subcommittee will stand in recess, and this hearing is adjourned.

[Whereupon, at 2:00 p.m., the subcommittee adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF
THE OUTDOOR POWER EQUIPMENT INSTITUTE, INC.
REGARDING S. 1400
"THE PRODUCT LIABILITY REFORM ACT OF 1989"

OPEI is a national trade association representing manufacturers of outdoor power equipment, as well as manufacturers of component parts to this equipment. Examples of such equipment include riding lawn mowers, walk behind lawn mowers, snowthrowers, shredder/grinders, edger/trimmers, commercial turf care equipment, powered log splitters, and powered rotary tillers. OPEI's members are headquartered throughout the United States. Their products are sold in all fifty states and in many U.S. territories.

For many years, OPEI has taken the position that product liability law reform, in the form of a federal uniform product liability statute, is badly needed in this country. The status quo, in which each state enforces its own liability laws, is unsatisfactory. Product liability laws vary and conflict between states. Because of this, manufacturers are placed at a distinct disadvantage in defending product liability lawsuits.

For example, some states place caps on the amount of punitive damages that can be awarded to plaintiffs, while other states do not limit the amount of these types of awards. Additionally, states have different statutes of limitation or statutes of repose, meaning that actions that are barred in some states can be brought in others. These variations encourage plaintiffs to "forum shop," i.e., to search for the state that provides the most hospitable environment for the particular cause of action alleged, even though that particular state may have little interest in the action.

Moreover, certain states have enacted laws that encourage grossly excessive damage awards. In many cases these awards bear no relationship to the injury they were designed to redress. The amount of these awards can be staggering: in a recent case a jury awarded $22.8 million to a plaintiff injured in a lawn mower accident.

These awards lead to additional costs to the manufacturer in the form of increased premiums on liability insurance. These costs must be borne by the manufacturers and, ultimately, by the consumers in the form of higher prices. In fact, the costs associated with defending product liability suits have increased so dramatically in recent years that innovative competitiveness in world markets and the financial viability of many U.S. outdoor power equipment manufacturers has been seriously impaired.

OPEI believes that the promulgation of federal uniform product liability would be a significant step in efforts to obtain reform. OPEI has traditionally been a proponent of such proposed legislation whenever it was introduced in previous sessions. The present proposed legislation should be passed, albeit with some modifications as set forth below.

OPEI strongly endorses the following sections of S. 1400:

Section 303 (Punitive Damages). OPEI supports the creation of a uniform standard for the imposition of punitive damages. Under this section a claimant must prove by clear and convincing evidence that a defendant's conduct manifested a conscious, flagrant indifference to the safety of persons who might be harmed by a product before it would be eligible to collect punitive damages. OPEI submits that this section will curtail grossly excessive punitive damage awards assessed against product manufacturers. This should help keep the cost of liability insurance from escalating.

Section 304 (Time Limitations). This section provides a two-year statute of limitations that begins to run when the claimant discovers or should have discovered the harm and its causes, and also establishes a 25 year statute of repose for capital goods that applies if the claimant is not eligible for workers' compensation benefits and the harm is not a "toxic" harm. The passage of this section should help prevent "forum shopping." However, OPEI requests that a ten year statute of repose for consumer goods be considered. This amount of time would be sufficient to protect consumers from dangerous products because 97 percent of product related accidents occur within six years of the time the product was first sold. A longer period of time for consumer goods would place too great a burden on the manufacturer to maintain records and prepare testimony regarding equipment that will likely be outdated by the time the action is brought.

Section 305 (Collateral Sources of Compensation). This section would reduce any damages by the amount of workers' compensation benefits the claimant may receive and precludes employers from shifting the costs of workers' compensation onto manufacturers unless the employer was not any way at fault in causing the claimant's harm. It should help prevent "double recoveries" by plaintiffs who could otherwise be compensated twice for a single economic injury.

Section 306 (Joint and Several Liability for Non-Economic Damages). This section would abolish joint and several liability for damages such as pain and suffering, emotional distress, etc., that are not related to economic injuries (lost income, future earning power) suffered by plaintiffs. It would apportion multiple defendants' responsibilities for these damages based on each defendant's share of responsibility for the harm. Thus, if a defendant manufacturer were found responsible for 20 percent of a particular injury and plaintiff was found to be 80 percent responsible because he was "contributorily negligent" (a not uncommon scenario in power equipment cases), the manufacturer would not be required to assume 100 percent of these costs. This is eminently more reasonable than the present situation, in which manufacturers are responsible for all of the costs, even if they caused only some of the harm.

OPEI believes that this section should be amended to include all damages, not just non-economic ones. It is illogical and unfair to require manufacturers, who are often the only "deep pocket" defendants, to assume responsibility for all economic damages.

CONCLUSION

OPEI fully supports efforts to make our product liability system more fair. OPEI welcomes this opportunity to comment on the Product Liability Reform Act of 1989 and looks forward to assisting in the development of a product liability system that best serves the interests of the outdoor power equipment industry and the consumer.

STATEMENT OF
ROBERT B. MCKAY, CHAIRMAN
ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM

AND

JAMES SEROTA, CHAIRMAN
INSURANCE INDUSTRY COMMITTEE
SECTION OF ANTITRUST LAW

OF THE

AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the Subcommittee.

We appreciate the opportunity to present the views of the American Bar Association on broad federal product liability legislation. We are Robert B. McKay, Chairman of the ABA's Action Commission to Improve the Tort Liability System and James Serota, Chairman of the Insurance Industry Committee of the Section of Antitrust Law.

During the past decade the ABA has extensively studied the tort liability system and its product liability laws because we are deeply committed to having a legal system in America that is effective and just, one that protects the rights of consumers and manufacturers, plaintiffs and defendants.

To that end, the ABA created three broadly-based entities to study: 1) the advisability of broad federal product liability laws; 2) the tort liability system; and 3) the liability insurance system.

The ABA has continuously opposed enactment of broad federal product liability legislation since February of 1981 when the ABA's policy-making body, the House of Delegates, adopted by voice vote a resolution opposing enactment of legislation which would impose a model products liability proposal as federal law.

The ABA opposes broad federal product liability legislation such as S.1400, the proposed "Product Liability Reform Act," because it would impair the rights of American consumers by depriving them of the sound guidance of the well developed product liability laws of their individual states, as well as the flexibility to carefully refine the law through their state courts, and to make any necessary major improvements in the law through their state legislatures in furtherance of their economic or social needs.

The broadly-based entity charged by the ABA to study the advisability of broad federal product liability legislation was appointed by the ABA President in 1982. I, Robert McKay, chaired the seven-member committee called the Special Committee to Study Product Liability. The Committee included among its members nominees of the Sections of Corporation, Banking and Business Law, Public Contract Law, Litigation and Tort and Insurance Practice. Based on the recommendations and report of the Special Committtee, the ABA's House of Delegates adopted the resolution appended to this statement as Appendix A. Also appended to this statement as Appendix B is the report that our House of Delegates considered when it adopted the February 1983 resolution. It discusses in detail the rationale for the ABA policy adopted in 1983.

The resolution opposes enactment of broad federal product liability legislation and supports enactment of narrowly drawn federal legislation on victim compensation which addresses the issues of liability and damages with respect to claims arising out of occupational diseases (such as asbestosis) with long latency periods in cases where the number of such claims and the liability for such damages threaten the solvency of a significant number of manufacturers engaged in commerce, and the number of such claims have been excessive burdens on the judicial system. It also supports federal legislation allocating product liability risks between the federal government and its contractors. The House of Delegates thus reaffirmed the wisdom of leaving the great majority of products liability case law to the various states which are in a position to best address themselves to the specific social and economic needs of their constituents.

The broadly-based entity charged by the ABA to study proposals to improve the tort liability system was appointed by the ABA President in 1985. I, Robert McKay, chaired the 14-member commission called the Action Commission to Improve the Tort Liability System.

The members of the Commission were federal trial and appellate court judges; a state Supreme Court justice; corporate counsel, including those with insurance experience; consumer and civil rights advocates; academicians; and practicing plaintiffs and defense lawyers.

In February 1987, the ABA House of delegates considered the Commission's recommendations and adopted the resolution appended to this statement as Appendix C.

With a possible exception relating to mass torts, the ABA takes the position that these proposals to improve the tort system can and should be implemented by the courts and legislatures at the state, and not the federal level. This is in keeping with the ABA's view that the tradition of state-fashioned tort principles remains fundamentally sound.

The ABA resolution makes numerous recommendations addressed to the courts and to the lawyers. These recommendations include the following:

1. No ceilings should be placed on pain and suffering awards. Instead, trial and appellate courts should more effectively control pain and suffering verdicts which are either so excessive or so inadequate as to be disproportionate to the injury suffered or to community expectations.

2. Tort awards for pain and suffering should be more uniform. To achieve that goal, the ABA recommends such approaches as objective annual studies of tort awards, public information on those awards, guidelines for use by the trial courts and study given as to whether additional guidance can and should be given to the jury on the range of appropriate damage awards.

3. As far as fee arrangements go, the ABA believes they should be written in plain English or appropriate other language, that percentage fees should be out of the net amount and not out of the gross amount of any judgment or settlement, and that the courts or a public body should disallow lawyers' fees that are found to be plainly excessive.

4. To protect future claimants, the ABA opposes various forms of secrecy agreements and arrangements that require destruction of information or records as well as agreements that would prohibit a particular attorney from representing other claimants.

5. The ABA has specific recommendations addressed to the courts to streamline the litigation process, to eliminate frivolous claims and to reduce the long delays currently characteristic of much litigation. These include permitting non-unanimous jury verdicts and use of alternative dispute resolution methods.

There are certain areas in which the ABA believes state legislative action may be needed.

1. The ABA believes that punitive damages are appropriate in certain cases, but their scope should be limited. They should not be commonplace. The basic standard to establish punitive damages should be a conscious or deliberate disregard of a defendant's obligations. The standard of proof should be "clear and convincing" evidence and not a lesser standard such as "a preponderance of the evidence".

2. The ABA is concerned that no defendant should be subjected to punitive damages that are excessive in the aggregate for the same wrongful act. There should therefore be safeguards to prevent the imposition of repeated punitive damages. The purpose of punitive damages is to punish, not to confiscate. The ABA recognizes that the principal responsibility to control excessive awards for punitive damages rests on the courts; however, state legislation may be necessary to assure more effective judicial review of punitive damage awards.

3. The ABA believes that the doctrine of joint and several liability should be limited by legislation to apply only to economic losses in certain cases. Defendants should not be held liable for someone else's share of any non-economic loss when the defendant's responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff.

4. The ABA recognizes that allowing non-unanimous jury verdicts may require legislation.

A number of states enacted tort reform legislation over the past several years. Some of those bills are quite far-ranging, others fairly limited. We do believe that state legislatures should review their tort systems.

The broadly-based entity charged by the ABA to study the Liability Insurance Commission was appointed by the ABA President in 1987 to report and make recommendations to our House of Delegates.

In response to the ABA Commission report, in February 1989 the American Bar Association's House of Delegates adopted a resolution containing the following two major recommendations:

I. The current McCarran-Ferguson exemption to the antitrust laws should be repealed and replaced with legislation containing the following features:

    (1) Insurers should be made subject to general antitrust laws but provided with authorization to engage in specified cooperative activity that is shown to not unreasonably restrain competition in the industry.

    (2) Insurers should be authorized to cooperate in the collection and dissemination of past loss experience data so long as those activities do not unreasonably restrain competition but should not be authorized to cooperate in the construction of advisory rates or the projection of loss experience into the future in such a manner as to interfere with competitive pricing.

    (3) Insurers should be authorized to cooperate to develop standardized policy forms in order to simplify consumer understanding, enhance price competition and support data collection efforts, but state regulators should be given authority to guard against the use of standardized forms to unreasonably limit choices available in the market.

(4) Insurers should be authorized to participate in voluntary joint underwriting agreements and in connection with such agreements to cooperate with each other in making rates, policy forms, and other essential insurance functions so long as those activities do not unreasonably restrain competition.

(5) Insurers participating in residual market mechanisms should be authorized in connection with such activity to cooperate in making rates, policy forms, and other essential insurance functions so long as the residual market mechanism is approved by and subject to the active supervision of a state regulatory agency.

(6) Insurers should be authorized to engage in such other collective activities that Congress specifically finds do not unreasonably restrain competition in insurance markets.

(7) State regulation of insurance rates should not exempt insurers from the antitrust laws under the state action doctrine, except as specified in Recommendation (1) to (6). Other non-rate regulation by a state should not exempt insurers from the antitrust laws unless that regulation satisfies the requirements of the state action doctrine and the regulation is shown to not unreasonably restrain competition.

II. States should retain the authority to regulate the business of insurance. The federal government should defer to state regulation except in those unusual circumstances where the regulatory objective can only be effectively accomplished through federal involvement.

In adopting these two recommendations, the ABA's House of Delegates was aware of the ABA Commission's finding that the effect of the McCarran-Ferguson exemption on insurance pricing and industry practices varies with the underlying state regulatory environment. Replacement of the McCarran-Ferguson exemption with legislation consistent with the ABA's recommendations may increase the competitive atmosphere of the industry and replace the uncertainty concerning the scope and meaning of the existing exemption. Although repeal would create some uncertainty, there is also uncertainty concerning the scope and meaning of the existing exemption. The existing exemption has a substantial impact on the perceptions of the industry and its critics, and unless the issue is resolved it may continue to distract policymakers from more central questions of insurance reform.

Throughout its report, the ABA Commission recommends enhancing competitive market forces as a means of improving the insurance industry. The continued existence of McCarran-Ferguson is inconsistent with that objective. The perception is widely held that McCarran-Ferguson permits insurers to manipulate the insurance mechanism and the price of insurance coverage collusively. Clearly, the industry believes the exemption permits cooperative activity that otherwise could raise serious antitrust concerns. These perceptions impeded consideration of other proposals which may hold greater promise of moderating availability and affordability problems.

The repeal of McCarran-Ferguson has become a symbol in the debate over causes of dislocations in private insurance markets. The ABA Commission did not believe repeal should be regarded as alone sufficient to improve the insurance system or to avoid future dislocations. The scope of the current exemption from entitrust enforcement is quite narow, and boycotts remain subject to antitrust laws. Much of the current concerted activity by insurers is arguably permitted even under the antitrust laws as long as it does not restrain trade. Accordingly, the ABA believes that, in general, the insurance industry should be subject to normal antitrust doctrine, although safe harbors should be specifically provided for cooperative behavior which clearly has legitimate procompetitive consequences.

McCarran-Ferguson is a powerful symbol of the primacy of state regulation of insurance. However, there is nothing in repeal of the exemption that necessitates elevating federal authority beyond application of antitrust laws. The ABA's second major recommendation emphasizes that, notwithstanding its recommendations regarding repeal of McCarran-Ferguson, state regulatory authority should be retained. Congress should not preempt current state regulatory regimes with federal regulation directed at the business of insurance. The tradition of state regulation, the long-standing experience shared by state insurance agencies, and the adjustment of the industry to state regulatory requirements should not be discarded lightly.

At the same time, the repeal of McCarran-Ferguson will intensify the need for independent and adequately funded state insurance agencies. Agencies could enhance the appearance of their independence and their access to broader perspectives if they would formalize the role of consumers in the regulatory process by the appointment of a consumer advocate.

Thank you for giving us this opportunity to present our views to you.

Statement of

The Associated General Contractors of America

The Associated General Contractors of America (AGC) represents more than 32,500 firms, including 8,000 of America's leading general construction contracting companies, which are responsible for the employment of more than 3,500,000 individuals. These member contractors perform more than 80 percent of America's contract construction of commercial buildings, highways, heavy, industrial and municipal-utilities facilities.

AGC appreciates the opportunity to express its views on S. 1400 and particularly Section 305 dealing with Uniform Standards for Offset of Workers' Compensation Benefits. AGC opposes the inclusion of Section 305 in this bill. The provisions of this section are not integral to product liability, and the bill, as a whole, is functional without Section 305.

AGC members are concerned about the impact that Section 305 will have on the increasingly high cost of workers compensation insurance. The effect of these provisions will be to shift the responsibility for workplace injuries caused by defective products from the manufacturer of the product to the injured workers' employer and the workers compensation system.

Section 305 requires that all product liability awards be reduced by the amount of workers' compensation a claimant receives or would be entitled to receive. Indeed, product liability actions under this title would be stayed at the claimant's sole discretion "until such time as the full amount payable as workers' compensation benefits has been finally determined under such workers' compensation law" --- draining the workers compensation system to the fullest before the product manufacturer's fault is even considered.

Further, this section effectively eliminates the right, available in all but a very few states, of subrogation by the employer of the injured worker or the employer's insurance carrier against the product manufacturer. There is no employer subrogation unless (1) the employer obtains an express indemnification from the product manufacturer, or (2) the employer or the employee's co-employees are determined to have no fault. Even in the situation in which the employer's fault is five or ten percent while the product manufacturer is found to be 90 or 95% at fault, the employer has no right of subrogation under this bill.

Construction contracting is a labor and materials intensive industry. There are a tremendous variety of products, ranging from chemicals to heavy equipment, on a construction site; construction workers are in constant contact with them. Because of the numbers of product manufacturers involved, the express indemnity in Section 305, even if obtainable, is highly impractical in the construction context.

Section 305 distorts established workers' compensation laws which delicately balance the no-fault employee benefit with the employers' right to seek indemnification or a subrogation lien. It seeks relief for product manufacturers at the expense of individual employers and the state workers compensation systems. When an employer is forced to accept, regardless of product manufacturer fault, responsibility for the total amount of entitled benefits under workers compensation insurance, the employer's experience rating --- a major factor in determining the premium paid --- is adversely affected. If an employer is group self-insured, as many AGC members are, this risk shifting is at least if not more inequitable.

Some have questioned the need or beneficial impact of product liability tort reform, but acceptance of the strong public policy behind the workers compensation system is evidenced by the 50 state and federal laws. The objectives of these laws have been the simple, prompt relief to work-accident victims regardless of fault and without resort to litigation. These objectives have been eroded in the nearly 80 years of the existence of these laws, but the need for the system is beyond question.

For some state workers compensation programs, the provisions of Section 305 will place even further strain on already dangerously weakened systems. Workers compensation undoubtedly will be the insurance crisis of the 90's. See the attached "Nation's Business" and "Business Insurance" articles.

Jobsite safety is a major concern of the construction industry requiring the commitment of both management and employees. As a practical matter, operating safely saves time and money. But to operate safely is also a moral imperative because safety and health are human concerns, not merely construction or legal concerns. AGC's members do not, as some have implied, need the threat of Section 305's provisions to enhance their interest in safety.

In conclusion, AGC believes that these provisions are focusing on one aspect of tort reform and in doing so are distorting the broader liability and insurance picture. Although AGC understands the general intention of S. 1400, it cannot endorse a provision which will take away from an employer the right to recover from a product manufacturer that may be responsible for an employee's injury. AGC, therefore, advocates the deletion of Section 305 of this bill.

STATEMENT OF THE NATIONAL GOVERNOR'S ASSOCIATION

On behalf of the National Governors' Association, thank you for this opportunity to submit a statement for the record on the matter of product liability insurance issues. This is a subject of importance to all Governors because of its implications for commerce, economic growth, and the welfare and safety of our citizens.

Manufacturers of everything from football helmets to hot air balloons, from immunization vaccines to automobiles, have been faced with the problem of rising product liability costs. Although manufacturers are not always without fault, the evolution of the concept of strict liability has meant that in many cases fault does not have to be proven by a plaintiff. Product manufacturers also complain that the differences in state liability laws have made it difficult for them to assess their own risks. Higher liability costs have been cited as reasons for the discontinuation of some necessary product lines. These increased costs and the general uncertainty about the nature of risk inhibit product development and may lead to inflated prices for our consumer goods.

Attached you will find a copy of the NGA policy statement on liability insurance adopted by NGA in August 1986. The policy makes three major points with regard to product liability: the first urges Congress to adopt a uniform product liability code; the second asks Congress to assess -- and, if necessary, enhance -- federal consumer protection and product safety standards; the third calls for more effective oversight of the insurance industry.

The Governors, in adopting this statement, noted that it effectively reversed the previous position which focused on avoiding federal preemption in the product liability area. It was also understood that the statement was not meant to necessarily endorse any particular piece of legislation under consideration by Congress.

It is well known that NGA traditionally has opposed federal preemption unless there are "highly compelling reasons to justify federal actions that require changes in policies adopted by state ... officials." * In adopting the provisions relating to product liability, the Governors concluded that because products are manufactured, marketed, and consumed in the various states, uniform standards of liability need to be developed to overcome the differences in state tort laws that could inhibit interstate commerce. They determined that such standards for product liability could be dealt with best at the federal level and therefore urge Congress to adopt a uniform product liability code. They limited their call for federal preemption to product liability only, noting that product liability is distinct (due to its interstate characteristics) from other areas of liability where state tort laws are applied.

Concerns have been expressed by consumer groups that a single set of standards may offer fewer incentives for companies to implement safety measures and produce sound products. Efforts to alleviate the problems faced by American companies should never, however unintentionally, lead to a deterioration of public safety and to the ability of victims to seek redress of serious and legitimate injuries. Thus, NGA policy calls upon Congress to enhance federal safety and consumer protection standards, if deemed appropriate.

[* NGA Policy Statement, A-3, Avoiding Federal Preemption of State Laws and Policies.]

In addition to the provisions on product liability, NGA policy further calls upon federal, state, and local governments and the private sector to coordinate their efforts in response to liability insurance problems. Governors, state legislators, and insurance commissioners in almost every state took a number of steps in an attempt to mitigate the effects of the recent liability insurance crisis, which extended far beyond the product liability area. This extraordinarily high level of activity reflects not only the states' recognition of the potentially serious effects of an insurance crisis on our nation's economy, but also an acknowledgement of the states' primary responsibility in responding to the problem. States have faced up to this responsibility through a number of innovative approaches.

While the insurance crisis has abated, the lasting effects of these various approaches remain to be seen. Even now, states have ongoing efforts to ascertain the impact of their recent efforts on the availability and affordability of liability insurance. Generally, it seems that some improvements in availability have been made, although certain sectors of the economy are still experiencing difficulty obtaining needed coverage at affordable rates.

In conclusion, states continue to seek effective solutions to the complex problem of insurance availability and affordability -- a problem which affects all of us. As on any number of issues, Governors and the states stand ready to work with Congress and the private sector to address problems of mutual concern.

STATEMENT OF THE SPORTING GOODS MANUFACTURERS ASSOCIATION

Thank you for allowing the Sporting Goods Manufacturers Association the opportunity to present testimony on the impact of product liability on the sports industry. We commend Senator Kasten and the Committee for holding this series of hearings.

By way of background information, the Sporting Goods Manufacturers Association represents approximately 1200 manufacturers and distributors of athletic footwear, equipment and clothing in 46 states. Together with our sister organizations, we represent 3500 companies in the sports business.

SGMA has long maintained an active leadership role in bringing the liability issue to the attention of Congress and the business community. We formed the Multi-Association Action Committee in 1977 as an ad hoc committee spearheading the drive for liability reform on the insurance and legal side. Our members have testified before Congress since 1977 and acted as a catalyst and clearinghouse to inform Congress and the Administration of our concerns.

Continuing our involvement in the liability issue, we formed the Coalition of Americans to Protect Sports (CAPS) in 1986. CAPS is a grassroots organization whose purpose is to inform coaches, schools, and the general public about the detrimental impact liability is having on manufacturers of sports equipment and programs across the United States. CAPS now is getting involved in risk management gameplans to combat liability.

Most recently, our Association formed a working group comprised of defense attorneys called the "Sports Litigators Group". This new advisory panel analyzes the impact of legislation on the sports industry and continues to serve as counsel to the association on the liability issue.

Today's hearing focuses on competitiveness. Competition defines the very essence of sports itself. Sports by nature is a very competitive, aggressive activity. More people are participating in sports and a wider range of sporting games are being played than in years past. The ever increasing popularity of sports and recreation in our society has led to a rise in the number of participants and spectators, and therefore, the number of injuries.

Today's athletes are stronger and bigger due to better nutrition and training methods. This provides for faster and harder hitting games and competitions.

In product liability cases, manufacturers and retailers are often guilty until proven innocent, not the other way around. Manufacturers of sports products are being sued, and often times the products aren't even identifiable! It's the largest and best known sporting good manufacturer in the marketplace that gets sued. Our tort system is askew.

It's no small wonder that enactment of a strong and sound federal product liability bill continues to be the number one legislative priority of the Sporting Goods Manufacturers Association.

Our membership roster reads like a list of "Who's Who" in the sports industry. Unfortunately, due to liability concerns, it may now read like a list of "Who Was" due to product lines being pulled from our members' shelves. The giants of the sports industry have their Achilles heel, and that is product liability.

We've all read the well heralded media reports of the decline of domestic football helmet manufacturers. To refresh your memory, four helmet manufacturers now survive out of a total of 18 back in 1970. Two of those four represent 90% of the helmet business.

But, there are other stories to be told. In an effort to obtain an accurate accounting for the impact liability is having on sporting goods manufacturers, we conducted a broad based survey in late 1988 and early 1989 on eight segments of our industry. The majority of respondents fell into the $2-10 million category for total company sales.

What did we learn? The overwhelming conclusion drawn from the survey is that liability is a major concern. Liability issues are carefully scrutinized when a product is being developed, marketed or manufactured. The "riskier" products which are seen as having high liability exposure potential are often times not marketed or manufactured.

Furthermore, some members indicated that they are hesitant to get into the product improvement aspects because of potential liability risk involved in any product changes.

Product manufacturers most significantly experiencing liability concerns include: archery, fitness, waterski, outdoor products, and baseball and softball members.

In December 1988, the oldest archery company in the United States located in Middlebury, Connecticut dissolved after 76 years in business. According to the firm's management, one of the major reasons to dissolve the company was the high cost of product liability coupled with decreasing sales to camps and schools who curtailed their physical education programs due to liability. So, the domino effect doesn't just end with the company going out of business. School programs are also impacted when liability crisis goes on without relief. Who loses? The kids enrolled in the classes lose, not just the manufacturers. They lose the chance to develop new skills and confidence.

The plight of Chouinard Equipment Company's uphill battles against escalating liability costs heightened awareness on outdoor industry segments late last year. Chouinard came to the end of their rope last year when the firm had to file for Chapter 11 protection under the Federal Bankruptcy Act. Thus ended Chouinard's thirty year track record of success as the premier manufacturer of mountain climbing equipment. According to management, the firm's filing of Chapter 11 was directly attributable to product liability lawsuits against the company. None of these lawsuits revolved around product failures, but misuse of the products when non-climbers used their mountain climbing equipment for purposes other than climbing yet continued to sue the company for failure to warn.

Manufacturers of other high-risk equipment, such as mountain bikes, back-country skiing gear, kayaks and canoes, as well as retailers, instructional groups and guide services, all felt a jolt. For example, one fast-growing manufacturer of climbing hardware is running without liability insurance because it simply can't afford it. The company is currently looking into the possibility of purchasing product-liability insurance, but it won't come cheaply. The general manager estimates that annual premiums will run $50,000, a hefty portion of the company's $800,000 annual sales. The general manager says the coverage will enable the company to survive one - maybe even two - lawsuits. So far, the company has never been sued.

The liability crisis also has spread to the bicycling industry. A small, state-of-the-art mountain-bike manufacturer with annual sales of about $300,000, carries no product-liability coverage. Its owner claims the cost of liability insurance would increase the price of his bikes by at least 20 percent. "Nobody could afford them," he says. "And I'd be out of business. All we can do is make a good product and keep our standards as high as we possibly can."

A third manufacturer of high-risk recreational equipment was hit with a lawsuit and saw its insurance dropped in the same month. The company's president says his firm is the only manufacturer in its field that still carries liability insurance. "Our rates were increased eight times in the past few years," he says. "And then this happened. I had to scramble to replace the coverage I lost. I was lucky to find anything. If this continues, the whole industry could go down the tubes."

A manufacturer of top of the line home fitness equipment in three years of manufacturing has had less than a 1% rate of return, with no claims against them; yet they are unable to get insurance. To manufacturer a mere 200 benches they must pay $20,000 in insurance. For this reason they are currently without coverage.

Playing catch with Dad could be gone for good in the 1990's. Already the Boy Scouts of America have a list of approximately ten activities which are unauthorized because of liability exposure. Football is one of those activities. Camping could be next. From 1984 to 1986 alone the Boy Scouts liability insurance costs have gone from 2 million to 10 million, for less coverage.

Much attention is being focused on Japan's "structural impediments". Well, failure to pass a strong, sound, uniform federal liability bill is the leading internal structural impediment faced by American firms. Our foreign counterparts often pay only 1/2 of 1% toward liability while some of our members report half of the cost of the product is spent toward liability.

U.S. firms shall continue to lag behind with the recognition of the European Economic Community's movement toward adoption of uniform product liability standards.

Let's not harp on what once was, let's strive to make America strong and U.S. firms competitive against their foreign counterparts without having to fork out dollar after dollar in the courtroom battles.

While lawsuits won't disappear with the enactment of S. 1400, the legislation offers stability and predictability to rules in the courtroom, thus ending the patchwork of 50 state laws.

The long, arduous road toward enactment of a federal bill must achieve sound results. After thirteen years running through the legislative liability maze, our members want practical legislation to deal with the issues confronting them in the court room. We need an assumption of risk provision in a federal bill! And we need to return to a fault based standard of liability. The majority of sports accidents are activity related, not product related. We can't continue to be insurers of risk in sports cases; however, manufacturers and institutions are the deep pocket because of the erosion of assumption of risk defenses. And, while there is often testimony in sports injury cases that players didn't read the warning labels on our products, it makes little difference to the judges or juries under the current system since the doctrine of strict liability seems to be the benchmarker.

Since sports is an aggressive, action-oriented activity, people need to take responsibility for their own actions.

Sports companies rely on quality products, brand name, and image for the success of their goods. Consumer confidence may erode unless sporting goods manufacturers can insure the safety of their products. Needed research and development funds are often diverted to product liability considerations.

It's time to get off of the liability treadmill and move the process toward the finish line. It's time to jump the financial hurdles placed on the process by the trial attorneys and win the race. Not only will the game be fairer, but consumers will come out ahead. We will all win.

The field of dreams will only be a dream if other products dissolve into the memories of the American public the way trampolines, football helmets, lawn darts, pole vaulting pits, and tree stands have. Other sports products are jeopardized including rowing machines, institutional gym equipment, heavier stationary bikes, gravity machines, protective eyewear, and baseball and softball protective equipment.

The reality of the situation is that we need your assistance in supporting reasonable legislative principles and Senator Kasten's bill is a good step in the right direction. Just as it is our mission to increase participation in sports, we also also strive to make America's tort system fit.

STATEMENT OF HON. SUSAN ENGELEITER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION

Mr. Chairman, I am pleased to take this opportunity to share the views of the U.S. Small Business Administration on a matter of great importance to the small business community: reform of our nation's product liability system. As your Committee considers the effectiveness of the current laws and the potential effect of federal pre-emption of state laws, I urge you to recognize the importance and timeliness of updating our product liability rules and the resultant positive impact for our economy.

I am particulary pleased to present my views on this important legislation sponsored by my good friend from my home state of Wisconsin. Senator Bob Kasten understands the needs of small business owners and recognizes the benefits that will result for small firms across this country as a result of product liability reform.

I, too, support efforts to change the present product liability system through the adoption of uniform federal guidelines and provisions designed to provide greater certainty to firms. The "Product Liability Reform Act" (S. 1400) proposes worthwhile changes to help advance this goal.

The Need for Change to the Product Liability System

For more than a decade, Congress has been wrestling with the issue of product liability reform. During that period, the existing approach to product liability disputes generated problems for American business that threaten the continued strength of our economy. The challenge before us is to craft a system that no longer penalizes American enterprise, inhibits innovation and threatens our competitiveness, but, at the same time, will safeguard the legitimate protection of an innocent person's right to be fairly compensated.

The inconsistency of differing state product liability laws has created a tangle of statutes that results in uncertainty for businesses operating in the national marketplace. They cannot predict potential liability once a product enters interstate commerce.

During the past 15 years, total filings of product liability lawsuits in federal courts increased 1,000 percent; in state courts, the increase was between 300 and 500 percent. Moreover, the litigation of product-related injuries often leads to unreasonably large judgments. According to a 1982 study by the Rand Corporation's Institute for Civil Justice, asbestos-case defendants (companies and insurers) spent about $95,000 for each claim settled. It is estimated that the total cost of product liability suits between 1973 and 1988 was $80 billion annually -- a sum equal to the combined profits of the 200 largest corporations in the United States.

In a 1988 Conference Board survey of chief executives, 40 percent of the respondents revealed that product liability has had a major impact on their business; 36 percent stopped some manufacturing as a result; 15 percent laid off workers; 8 percent closed plants.

The costs associated with these suits impacts disproportionately on small firms. Small businesses are unable to pass the increased costs of insurance and litigation onto the consumer and remain competitive. This is extremely counterproductive in a sector of the economy that has been responsible for more than half the country's technical and industrial innovations during the past four-and-a-half decades. It is also threatening to an economy in which small companies employ over half the nation's work force and are responsible for 39 percent of the Gross National Product. The bottom line is that anything hindering the productivity of small businesses hinders economic progress in the United States.

The key to any useful reform is that it provide small companies with the framework and predictability needed to remain vital and progressive contributors to economic growth. It would be in the interests of businesses large and small to have a uniform fault-based system for product liability. Such a system would alleviate those instances where, frequently, manufacturers are held liable when they fail to warn consumers about dangers that could not have been known at the time of manufacture, or when problems develop even after manufacturers have complied with established federal safety regulations.

Stability is especially crucial with the emergence of the global marketplace. Changes in international trade and commerce present opportunities and challenges for American business. In 1992, the European Community will become a unified $4 trillion market, 320 million people strong. The U.S.-Canada Free Trade Agreement will eliminate all trade tariffs between Canada and the United States by the turn of the century. The prospects for business made possible by these developments will be exciting, the challenges extremely stiff.

We must be able to compete effectively if our economy is to enjoy continued prosperity. That will be difficult as long as U.S. business is absorbing the high price of product liability problems. Consider that total liability insurance costs in the United States are estimated to be, on average, some 20 times higher than in European nations, which prohibit punitive damages, and where suits entail far lower attorneys' fees and other litigation expenses. As a result, these costs, which are reflected in higher prices for U.S. goods, hamper our ability to compete with foreign manufacturers, both at home and abroad. Particularly, we need a small business sector that is not saddled with unnecessary, inhibiting burdens. American small businesses must become major players in the international marketplace, just as they have on the domestic front.

The Administration supports the bipartisan product liability reform legislation (S. 1400) that has been introduced in the Senate. The bill would establish, for example, uniform standards for product seller liability; uniform standards for the award of punitive damages; and uniform time limitations on liability.

The Administration would be pleased to work with Congress in developing additional provisions to strengthen this legislation which, we believe, along with S. 1400 will help to resolve many of the problems created by the product liability system in this country. Opportunity is the key to prosperity in business.

Problems associated with and fostered by our present product liability system deny opportunities and dampen prospects for small business owners. Thank you for your consideration of these points on this important issue.

STATEMENT OF PROFESSOR MICHAEL E. PORTER HARVARD BUSINESS SCHOOL

My name is Michael E. Porter and I am a professor at the Harvard University Business School. It is my understanding that this Committee is considering the ways in which product liability laws affect the competitiveness of U.S. businesses in international markets. While I am not an attorney and have not considered the merits of S. 1400, the legislation at issue, I have recently completed a four-year study on international competitiveness. Although product liability laws were not a principle focus of my research, which was broader in scope, I did find that U.S. product liability laws are one factor that inhibits competitiveness and innovation in American industry.

In my study of competitiveness I examined in depth the economies of ten important trading nations, including the United States. Approximately 110 industries, chosen to reflect each nation's competitiveness were studied in depth. The aim was to identify the factors that contributed to competitive successes and failures, and the role of the national environment in the process. I found that traditional theories of competition, that focus on production factors such as land, labor, capital and natural resources, do not satisfactorily explain why industries or nations succeed or fail in international competition in the advanced industries that form the backbone of an economy such as the United States.

It was necessary, therefore, to develop a new theory of national competitive advantage, based on the premise that competition is dynamic and evolving. This new theory goes beyond cost and explains why companies from some nations are better than others at creating advantages based on quality, features, and new product innovation. The results of my research will be published this month in a book entitled "The Competitive Advantage of Nations."

I found that companies achieve competitive advantage through acts of innovation. They approach innovation in its broadest sense, including both new technologies and new ways of doing things. They perceive a new basis for competing or find better means for competing in old ways.

In international markets, innovations that yield competitive advantage anticipate both domestic and foreign needs. For example, as international concern for product safety has grown, Swedish companies like Volvo, Atlas Copco, and AGA have succeeded by anticipating the market opportunity in this area. On the other hand, innovations that respond to concerns or circumstances that are peculiar to the home market can actually retard international competitive success. The lure of the huge U.S. defense market, for instance, has diverted the attention of U.S. materials and machine-tool companies from attractive, global commercial markets.

With few exceptions, innovation is the result of unusual effort. The company that successfully implements a new or better way of competing pursues its approach with dogged determination, often in the face of harsh criticism and tough obstacles. In fact, to succeed, innovation usually requires pressure, necessity, and even adversity: the fear of loss often proves more powerful than the hope of gain.

Once a company achieves competitive advantage through an innovation, it can sustain it only through relentless improvement. Almost any advantage can be imitated. Korean companies have already matched the ability of their Japanese rivals to mass-produce standard color televisions and VCRs; Brazilian companies have assembled technology and designs comparable to Italian competitors in casual leather footwear. Change is an unnatural act, particularly in successful companies; powerful forces are at work to avoid it at all costs.

Ultimately, the only way to sustain a competitive advantage is to upgrade it - to move to more sophisticated types. This is precisely what Japanese automakers have done. They initially penetrated foreign markets with small, inexpensive compact cars of adequate quality and competed on the basis of lower labor costs. Even while their labor-cost advantage persisted, however, the Japanese companies were upgrading. They invested aggressively to build large modern plants to reap economies of scale. They became innovators in process technology, pioneering just-in-time production and a host of other quality and productivity practices. These process improvements led to better product quality, better repair records, and better customer-satisfaction ratings than foreign competitors had. Most recently, Japanese automakers have advanced to the vanguard of product technology and are introducing new, premium brand names to compete with the world's most prestigious passenger cars.

The theory of competitiveness advanced in my book identifies four essential attributes of a nation that shape this ability of its firms to achieve competitive advantage in international markets. These form what I call the "diamond" of national competitive advantage. These four determinants are: 1) factor conditions, or a nation's ability to create and upgrade human resources, knowledge, and infrastructure that are specialized to particular industries, and the degree to which factor cost provisions free a nation's firms to upgrade the sophistication of their advantages over time; 2) demand conditions, especially the extent to which domestic customers for the industry's product or service are sophisticated, demanding, and have needs that foreshadow these in international markets; 3) the presence of related and supporting industries in the nation are competing to provide the best available inputs and technology, and stimulate the process of improvement and innovation; and 4) company strategy, structure, and rivalry -- the conditions governing how a nation's businesses are created, organized, and managed, as well as the nature and vigor of domestic competition.

The fundamental lesson that emerges from this theory is that the quiet life is an enemy of competitive advantage. Industries thrive when their customers won't accept inferior or outmoded products, they are forced to overcome high labor costs or a lack of natural resources, when their local competitors are capable and aggressive, and when government offers no protection from fair competition and sets tough technical and regulatory standards.

In practice, the competitive advantage emerges from a national environment in which many of the determinants are favorable. Competitive advantage based on only one or two points of the diamond, especially factor costs, usually proves unsustainable because global competitors can easily circumvent it.

Because government plays a prominent role in international competition, the study examined government policies that promote and inhibit competitiveness. I found that the real role of government in competition is different from the one generally supposed in traditional theory. Governments do not control national competitive advantage; they can only influence it. A nation's firms themselves must ultimately create and sustain competitive advantage compared to rivals from other nations. Government can shape or influence the context and institutional structure surrounding firms, however, as well as the inputs they draw upon. Government must not try to ease the pressure on industry but must ensure vigorous competition and provisions for upgrading.

Government should play a direct role only in those areas where firms are unable to act (such as trade policy) or where externalities cause firms to underinvest. Externalities occur where the benefits to a nation as a whole exceed those accruing to any single firm or individual, so that private entities will tend to underinvest in such areas from the perspective of the nation. Good examples are general education, environmental quality, and research and development that can boost productivity in many industries.

Strict government standards for performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage. Tough standards also encourage the start-up of specialized manufacturing and service firms to help address them, which can develop strong international positions. American firms have historically led in the export of pollution control equipment and services, reflecting advanced domestic standards.

Regulation undermines competitive advantage, however, if a nation's regulations lag behind those of other nations or are anachronistic. Such regulations will retard innovation or channel the innovations of domestic firms in the wrong directions. An electric code based on twenty-year-old technology, for example, will work against the competitive advantage of all the industries in a country that are affected by it. Similarly, the practice of using idiosyncratic local regulations to protect a domestic industry will only work to ensure that its competitive success is domestic.

Product Liability

A prominent example of an area where regulatory policy can work for or against national advantage is product liability. Product liability laws can benefit competitive advantage by acting like a sophisticated buyer to encourage and pressure the development of better products. In the United States, however, product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly and, as importantly, lengthy product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches.

An example from one of the industries we examined illustrates my point. Because the U.S. led the world in state-of-the-art medical research, and because of U.S. strength in the electronics and electrical industries, and because of active domestic rivalry, the U.S.

has been a leader in the patient monitoring systems. Today, however, radical change in patient monitoring devices is emerging with the development of a "closed-loop" monitor. Here, a monitor would adjust aspects of patient treatment, such as intravenous drug dosage, based solely on the patient's vital signs, making intervention by a doctor or nurse unnecessary. Just as these closed-loop systems are gaining popularity in Europe, such systems were going nowhere in the U.S. because of potential product liability problems. While the threat of lawsuits initially had encouraged patient monitoring that reduced risk and did not involve treatment, it was now beginning to impede innovation in monitors as well as other medical areas.

It is time for a systematic overhaul of the U.S. product liability system. The ease of filing lawsuits -- often of little merit -- combined with huge and unpredictable damage awards, goes well beyond the point of benefiting either the consumer or U.S. industry. Liability law as it is now structured causes companies to slow the rate of innovation. Because product innovation is central to maintaining and improving competitiveness, and because product liability is an externality that government alone can change, government reform of U.S. product liability laws would be an appropriate pro-competitive action.

STATEMENT OF GEORGE S. FRAZZA
GENERAL COUNSEL
JOHNSON & JOHNSON

My name is George Frazza, and I am General Counsel of Johnson & Johnson. I am submitting this statement on behalf of my own company and on behalf of the pharmaceutical industry.

Twenty years ago, product liability litigation was an insignificant backwater in the conduct of our business at Johnson & Johnson. In 1987, when I testified before the House Subcommittee on Commerce, Consumer Protection and Competitiveness, I discussed how product liability litigation had become a major preoccupation of our company, from our Chairman on down, and that while there were several reasons for this dramatic transformation, one of the most important reasons was punitive damages. This situation remains so today, almost three years later.

In the United States today, there is no single standard by which a pharmaceutical manufacturer's product is judged. In this country, a pharmaceutical may not be sold unless the product has been reviewed and found to be safe and effective by the federal Food and Drug Administration. In the case of a new pharmaceutical, the required tests and FDA review take approximately ten years and can cost as much as $125 million. This comprehensive process includes FDA approval of a drug's ingredient; formula; testing; packaging; and manufacturing procedures. It also includes word-by-word approval of a new drug's official labeling, including warning information provided to physicians. Once a new drug is finally approved and on the market, a manufacturer must also obtain FDA approval for any changes in product composition or label information. In addition, drug manufacturers must inform FDA of any and all important information - including any adverse reactions - discovered after a product has been approved by the Agency. Yet, despite this rigorous pre-marketing approval and post-marketing surveillance, pharmaceutical products are subjected to an additional, and often contradictory, scrutiny - the lay jury.

Punitive damages exist to punish a party for committing a malicious or deliberately harmful act. Evidence is supposed to be required to prove that the defendant acted maliciously or with willful disregard for the safety of the injured party. However, in many cases today, these requirements for awarding punitive damages are being seriously eroded and even ignored. Punitive damages are now routinely sought by plaintiffs and many juries are awarding punitive damages where there is no evidence of malicious behavior by the manufacturer.

At Johnson & Johnson, we have been held liable for punitive damages despite our best efforts to adhere to the highest standards of corporate citizenship. We have been meted punishment by juries for the adverse effects of our medicines even though we have scrupulously followed federal requirements in developing, testing, marketing and warning about our products. For example, in Wooderson v. Ortho, a Kansas jury decided that a physician-package insert was inadequate because it did not warn of an association that the plaintiff claimed existed between her illness and our oral contraceptive. The jury punished our Ortho subsidiary to the tune of $3 million for failing to warn of this association, even though the federal Food and Drug Administration specifically considered and disapproved exactly that warning because there was no medical justification for it.

This second guessing of FDA approval by juries has created a climate of uncertainty for the pharmaceutical industry. The pharmaceutical manufacturer has no reliable means for predicting the future viability of a drug once it reaches the market. This climate of uncertainty has had an adverse impact upon the citizens of this country in the form of higher prices and fewer choices in the marketplace. To quote from a 1988 report of the Board of Trustees of the American Medical Association:

> "Product liability is having a profound negative impact on the development of new medical technologies. Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks."

The most obvious examples of adverse effects on pharmaceutical research and availability are in the areas of contraceptives, drugs for use in pregnancy and vaccines, especially childhood vaccines. I will mention only a few examples:

Over the past decade, many manufacturers have been forced out of the vaccine field. Today, in the United States, only two manufacturers supply the vaccine that protects against whooping cough and there are only single producers for many other essential vaccines. Recently, the manufacturer of a vaccine for Japanese encephalitis discontinued distribution in this country because of liability concerns.

And vaccines are not the only therapeutic area that has been affected. Bendectin was the only drug available to treat morning sickness during pregnancy. In 1985, its manufacturer, Merrell Dow, faced multiple suits alleging that Bendectin caused birth defects. After years of study, the Food and Drug Administration and its expert advisory committees, and, indeed, the world-wide scientific community, has never found any credible evidence that Bendectin causes birth defects. Nonetheless, Merrell Dow decided it had to take Bendectin off the market -- solely because of the threat of liability. In response, the American College of Obstetricians protested that the loss of Bendectin created:

> "a significant therapeutic gap. . . that could lead to serious maternal nutritional . . . deficiencies."

Contraceptive research has also been adversely affected. Over the past three decades, at least nine PMA member companies have been involved in research and development of new contraceptives. However, by the mid-1980's only our subsidiary, Ortho Pharmaceutical, continued significant contraceptive research and development. And I can tell you from personal experience that contraceptives is the largest source of product liability litigation at Johnson & Johnson.

Several months ago, the National Academy of Sciences released a report on the development of contraceptives in this country. In this report, the Academy states:

> "Two aspects of recent products liability litigation and its impact are significant in the context of contraceptives: one is the unpredictable nature of litigation, which results in part from the absence of stable and uniform national products liability rules and in part from the often erratic character of the litigation system; the other is that, although manufacturers may introduce evidence of compliance with FDA regulations in a products liability lawsuit, this evidence is given no special status in most states."
>
> "Without changes in the products liability rules and procedures, it appears likely that even fewer firms will allocate even fewer resources to contraceptive research and development."

Mr. Chairman, I am submitting this statement to advance the concept of a uniform, federal defense to punitive damages for drugs that have been through appropriate FDA review. I am submitting this statement to advance a concept that will create a climate of predictability for the pharmaceutical industry. The concept that I am advancing is not an absolute defense to punitive damages. If the Agency's review process has been perverted by the manufacturer's committing fraud on FDA, or intentionally and in violation of FDA's regulations misrepresenting or withholding from the Agency information which was known to be material and relevant to the harm in question, then, of course, the manufacturer should lose any protection and should be liable for punitive damages under the same standard as any other product manufacturer. This is the recommendation that the National Academy of Sciences makes in its very recent report that I alluded to earlier.

As such, I support the idea behind the government standards defense to punitives contained in S.1400. This provision would afford a defense for products that are required to undergo the NDA process and are approved for marketing by the FDA. This provision would also afford a defense for those drugs that are classified as generally recognized as safe and effective and the manufacturer has complied with applicable regulations, including packaging and labelling regulations.

However, I cannot fully support the precise language of the provision itself. First, I cannot support language that would deprive pharmaceutical manufacturers of a defense on the grounds that the manufacturer failed to provide information to any federal agency other than to the FDA. Only the FDA has the specific authority to regulate the approval and marketing of pharmaceutical and biological products and any federal government standards defense statute should recognize this fact. Involving other unrelated federal agencies in a government standards defense statute would unnecessarily complicate litigation processes and would undermine the concept of uniformity which I am advocating.

Second, the pharmaceutical manufacturer should not be deprived of the government standards defense for failing to provide information to the FDA that is not required by the FDA. The very reason for the government standards defense is to prevent the manufacturer from being punished for following the FDA's direction. The FDA regulations require manufacturers to submit only the information the FDA needs to make an informed decision. This limitation is necessary in order to keep the amount of information the FDA receives manageable. Thus, in every case, the manufacturer - at FDA's direction - literally withholds information from the agency.

Finally, the manufacturer should only be deprived of the government standards defense when the information withheld relates to the plaintiff's harm. This is consistent with well-established and recognized legal principles of causation.

Mr. Chairman, the pharmaceutical industry stands ready to work with you in developing an appropriate legislative solution to a problem that in fact threatens to have long term adverse effects on the health of the American public. I would be pleased to answer any questions that you or any other members of the Committee may have.

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President and CEO

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February 20, 1990

Honorable Richard H. Bryan, Chairman
Consumer Subcommittee
Committee on Commerce, Science, and Transportation
SH-227 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Hardware Manufacturers Association (AHMA), I wish to submit these comments for the record of your hearing on product liability. AHMA represents over 1,000 manufacturers in the $90 billion consumer hardlines industry.

We strongly support enactment of a uniform federal product liability standard, and specifically, we support S. 1400. The reasons for our support are simple. Our manufacturers expend significant sums of money and time on anticipating, preparing for, and defending product liability suits. More often than not, the allegations prove to be groundless, but not until much time and effort have been wasted. The cases that do result in a finding of liability, generate awards disproportionate to the injury, and drive our costs up even further.

A recent survey of AHMA members revealed that 83 percent of the respondents reported an increase in their product liability insurance premiums. Perhaps of greater importance, 51 percent reported that the increase was significant. We believe the average increase to have been approximately 18 percent last year.

The same survey indicated that approximately one third had been involved in the defense of a product liability claim in 1987 and in 1988. Just less than a third indicated product liability litigation has increased in the last year. At least 15 percent of the respondents indicated that they decided not to launch a new product in the last two years as a result of product liability concerns. As many others have observed, we believe the current system suffers from three basic problems.

The system, itself, creates uncertainty. Each state has established, through legislation and court-made common law, its own product liability standards. The standards, and the process for resolving product-related injury claims, vary greatly from state-to-state. Manufacturers cannot predict with certainty their

**Elected Members of Board*

Reply to: Suite 1201 1025 Vermont Avenue, N.W. Washington, D.C. 20005 (202)639-2084

potential liability once their products enter the stream of interstate commerce. The lack of consistency also promotes "forum" shopping by plaintiffs seeking the most favorable "climate" for the claim.

The standards, as established and as interpreted over the years, no longer reflect the realities of the marketplace or the economy. In many instances, standards no longer recognize that a manufacturer is working within the constraints of the existing state-of-the-art or that the user does have some fundamental responsibilities with respect to the ultimate use of the product.

The civil justice system is a system gone amok. Legal theories such as joint and several liability, punitive damages, and the lack of procedural restraints on litigants and their representatives, are the foundations of litigious society.

We believe that at a time when Americans are eager to restore our competitive place in the world market, manufacturers are losing ground to foreign competitors because of the product liability crisis. Without having to absorb the high cost of U.S. product liability laws on the bulk of their sales, foreign manufacturers have an obvious price advantage. As part of EC '92, the countries in the European Economic Community will have adopted uniform product liability standards.

Our solution is to enact a uniform product liability law. Establish standards that permit a manufacturer to demonstrate that the product was developed under the then state-of-the-art. Restore common sense by acknowledging users have a responsibility to exercise judgment and should not be absolved of their own negligent actions. Eliminate the incentives for frivolous litigation and reduce the lottery mentality that pervades our civil justice system.

We urge this committee to move quickly to report favorably on S. 1400. We have lost too much time already.

Thank you for this opportunity to offer our views.

Sincerely,

William P. Farrell /cdm
William P. Farrell
President and CEO

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CABLE ADDRESS
ADVOCATE

March 2, 1990

The Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Senate Committee on Commerce,
  Science and Transportation
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation recently held a hearing to review the merits of S. 1400, the Product Liability Reform Act. I represent and am writing on behalf of the Specialty Equipment Market Association (SEMA), a trade association composed of 2,100 members including manufacturers and distributors of specialty and custom aftermarket parts and accessories for motor vehicles. We submit this letter as written testimony in support of a uniform product liability standard and request that it be included as part of the record of these hearings.

Products manufactured by SEMA members regularly traverse state borders. State liability laws are diverse, however. As a result, liability risks for those products are uncertain and insurance costs are exorbitant. We strongly endorse the concept of a Federal uniform product liability standard and urge this Subcommittee to approve legislation to establish such a statute, S. 1400.

SEMA has supported the enactment of Federal product liability legislation for the past decade. During that time, insurance costs have skyrocketed due to unpredictable jury awards and the myriad of state laws which govern the issue. The problem is so severe, some insurance companies no longer sell that form of coverage. All of our members have experienced difficulty in obtaining affordable liability insurance; several of our members have faced bankruptcy due to uncontrolled insurance costs. In the past, premiums averaged $2,000 to $5,000 per year for $5 million in [illegible],000 per year for as little as $300,000 in coverage.

The legislation before your Subcommittee is the result of a strong bi-partisan effort to craft a bill which protects both the manufacturer and purchaser. We applaud the measure and believe it represents a good base from which to structure a national product liability system. In addition, we would like to take this opportunity to make several recommendations which could further strengthen the bill and ensure predictability in the system.

We strongly encourage the inclusion of an absolute cap on the amount a plaintiff could collect in punitive damages or for pain and suffering. Because damage awards will still be allowed, the consumer's rights will be protected. In fact, numerous studies have demonstrated that jury awards can be very unfair -- many times grossly overpaying plaintiffs with small losses while underpaying legitimate claims for severe losses. We favor the development of guidelines for such awards and judicial control over their implementation. A cap on damage awards will return rationality to the courtroom and predictability to actuarial tables.

We also believe a common defense provision should be included within S. 1400 which would help expedite litigation. Under such a proposal, once a product's safety had been established in a single court ruling, that ruling in favor of the product's safety would control another case brought by a different victim. The individual plaintiff would still be protected because the analysis which led to the favorable ruling would always be available for review.

As we have stated, SEMA wholeheartedly supports reform of the present product liability system. Among other attributes, it will improve the competitiveness of U.S. manufacturers as insurance costs become assessable; unnecessary legal costs are reduced; and, companies are encouraged to produce new, safe products. As a result, insurance companies which have refrained from selling product liability premiums will return to the market place, helping to restore competitive prices. Concurrently, consumers will still be afforded protection, court juries and contingency fees.

Once again, we thank you for the opportunity to comment on this critical issue. Please feel free to contact me if I might be of any further assistance.

Sincerely,

JOHN RUSSELL DEANE III
General Counsel,
Specialty Equipment Market
Association

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March 4, 1990

The Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
Senate Committee on Commerce,
Science and Transportation
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation held a hearing on February 22, 1990 to review S. 1400, the Product Liability Reform Act. I represent and am writing on behalf of the Auto International Association (AIA). We are submitting this letter as written testimony in support of a uniform product liability standard and request that it be included as part of the record of the hearing.

AIA is a trade association composed of over three hundred importers, exporters, manufacturers, representatives and distributors of parts and accessories for imported vehicles. The industry is similar in market structure to other auto parts distribution systems. For example, it begins at the warehouse level where most inventory is held in storage. Jobbers and the warehouses themselves then distribute the parts to various retail outlets, which could be stores, dealerships, repair shops, or service stations. The industry of which we are a part is composed of nearly 3,000 small businesses supporting over 100,000 Americans.

Products distributed by AIA members regularly travel in the stream of interstate commerce. However, the present variety of state product liability laws has left our members uncertain with regard to their varying exorbitant costs of product liability insurance and potential legal fees. We, therefore, strongly support a national uniform product liability standard and urge your Subcommittee to establish such a statute, as outlined in S. 1400.

During the past decade, insurance costs have skyrocketed due to unpredictable jury awards and the plethora of state laws which maintain jurisdiction over the issue. The problem is so severe, some insurance companies no longer sell that form of coverage. A majority of our members have experienced declining profits as well as an increased threat of losing their businesses because of the high insurance rates. In years past, an AIA member was able to secure $5 million in product liability coverage for a premium averaging $3,000. Now our members are paying ten times that premium amount for as little as $300,000 in coverage. Many small businesses nationwide are being forced to stop carrying liability insurance while others are being driven out of business as a result of this crisis. These parties will not be the only ones to suffer. Consumers will continue to experience substantial increases in the cost of consumer products. In addition, consumers injured by a product will find that they have no source of compensation due to the limited assets and no insurance coverage of the manufacturer, distributor or retailer of the product.

S. 1400 is the culmination of many hours of previous expert testimony before your Subcommittee and other Congressional panels and an impressive bi-partisan effort on the part of lawmakers. It seeks to protect both the manufacturer and purchaser. We strongly support the measure and believe it represents a good base from which to structure a national product liability system. Additionally, we would like to take this opportunity to make several recommendations which could further strengthen the bill and ensure predictability in the system.

We urge the Subcommittee to include within the legislation an absolute cap on the amount a plaintiff could collect in punitive damages or for pain and suffering. Because damage awards would still exist, the consumer would be assured protection. On the other hand, an absolute cap is a key component to developing predictable insurance actuarial tables. It has also been documented that many jury awards are actually unfair, frequently grossly overpaying plaintiffs with small losses while underpaying legitimate claims for severe losses. We endorse the development of guidelines for such awards and judicial control over their implementation.

We also believe a common defense provision should be included within S. 1400 which would help expedite litigation. Under such a proposal, once a product's safety had been established in a single court ruling, that ruling would control another case brought by another victim. The individual plaintiff would still be protected because the analysis which led to the favorable ruling would always be available for review.

In summary, AIA avidly supports federal legislation which clearly identifies the obligations of the manufacturer, seller and consumer. Such a national policy can protect and compensate the consumer in a fair fashion. At the same time, a national liability system will: improve the competitiveness of U.S. manufacturers; reduce unnecessary legal costs; and encourage safe, new products. Finally, such legislation will restore fair and competitive prices in the insurance industry.

Once again, thank you for the opportunity to comment on this topic. If we may be able to provide information regarding the above, please do not hesitate to contact me.

Sincerely,

John Russell Deane III

JOHN RUSSELL DEANE III
General Counsel,
Auto International Association

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Peter W. Schwartz
Executive Vice President

March 7, 1990

The Honorable Richard H. Bryan
Chairman
Consumer Subcommittee
United States Senate
227 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Bryan:

On behalf of the American Supply Association (ASA), I wish to express our views on S.1400 and request that our statement be included in the hearing record for the February 22 hearing.

ASA supports your Subcommittee's efforts to enact a uniform federal product liability law. Our members, who are wholesalers of plumbing-heating-cooling products and systems, are all too aware of the uncertainty and unfairness which results from the current patchwork of differing state tort laws. We believe S.1400 would establish a more reasonable and just system for litigating product liability claims.

One issue of particular concern to ASA members relates to our role as wholesaler-distributors. As suppliers of plumbing-heating-cooling equipment and related pipe, valves and fittings, ASA members are increasingly faced with product liability litigation when a manufacturer from a foreign country cannot be reached for service of process. Or if they can be served, they are often not able to satisfy the judgment.

In these instances, the ASA company becomes the unwitting defendant, who must take responsibility for the manufacturer's negligence. This happens even though there is no hint of wrongdoing on the part of the ASA supplier. The company is liable for handling a defective product which has been imported from another country.

Quite simply, ASA members, along with other suppliers, have been placed in the difficult position of having to insure every foreign manufacturer with whom they deal. This is clearly an unreasonable position to expect any U.S. company to assume.

Unfortunately, S.1400 does not address this problem. Even though the legislation establishes a fault-based liability standard for product sellers, our members and other suppliers nevertheless can still be liable for damages proximately caused by a defective product produced by a foreign manufacturer -- even in the absence of any negligence by the supplier. This can happen because S.1400 permits the product seller to be liable whenever a product manufacturer cannot be reached for service of process or is financially unable to satisfy a judgment.

We are not suggesting that the product seller be immune from liability since undoubtedly the consumer must have some recourse when he has been injured by a defective product imported by an off-shore manufacturer. Rather, ASA is merely trying to find some reasonable way to hold foreign manufacturers accountable for the injuries caused by their products.

We believe it would be a fair and prudent addition to your legislation to require the foreign manufacturer to register in the U.S. so they can be subject to service of process. In addition, there should be a financial solvency requirement -- so that foreign manufacturers must either demonstrate that they are financially solvent or post bond.

Both these provisions would go a long way toward insuring that the party responsible for damage caused by a product would be the one to pay. It would remove wholesalers and suppliers from the difficult position of having to insure every foreign manufacturer with whom they deal.

We applaud your efforts to enact legislation to establish a more just and uniform product liability system. The provisions we have described above can only strengthen the bill and contribute to achievement of a more equitable system.

We will continue to support you in this endeavor and appreciate your consideration of our views.

Sincerely,

Frank Finkel
President

ROBINS, KAPLAN, MILLER & CIRESI
ATTORNEYS AT LAW

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April 23, 1990

Senator Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science, and Transportation
United States Congress
Washington, D.C. 20510

VIA FEDERAL EXPRESS

Dear Chairman Bryan:

We are partners in Robins, Kaplan, Miller & Ciresi, a Minneapolis-based law firm which has a national litigation practice representing both plaintiffs and corporate defendants in products liability cases. We are writing to you because we have been informed of the testimony by Peter Huber regarding his views of the American product liability system and, in particular, the case of the Cu-7 IUD. In the interest of accuracy and fairness, we must respond, and we request that this letter, with accompanying attachments, be made part of the hearing record of April 5, 1990 for S. 1400.

This response is not based upon hearsay or hyperbole. Instead, this response is based on first-hand knowledge and experience, gained from years of Cu-7 litigation against G.D. Searle & Co. (All of our Cu-7 cases settled in 1989, and at this time we are no longer involved in any litigation against Searle. At Searle's insistence, the monetary terms of all of our Cu-7 settlements are confidential).

In 1982, our firm was appointed by the United States District Court in Minnesota as lead plaintiffs' counsel for all Cu-7 cases pending in federal court in this state. Over the following six years, a team of attorneys from our firm undertook a massive effort to uncover the facts regarding the Cu-7 and Searle's conduct in designing, testing and marketing the Cu-7.

The magnitude of the litigation -- and Searle's intransigence -- led the District Court to appoint a Special Master to supervise discovery. Early in the litigation, Searle's refusal to comply with our discovery requests resulted in a court-imposed sanction of $65,000. (This sanction was stayed in order to provide Searle with an opportunity to absolve itself through future compliance with discovery proceedings). Later in the litigation, Searle appealed one discovery issue from the Special Master, to the District Court, to the Court of Appeals for the Eighth Circuit, to the United States Supreme Court, which denied Searle's petition for certiorari -- all in an effort to prevent the disclosure of damaging internal documents.

In the end, our attorneys reviewed more than 600,000 pages of internal Searle documents and took depositions of more than 30 present or former Searle employees. This effort on behalf of Cu-7 victims cost our firm in excess of $10 million in attorneys' time and out-of-pocket expenses.

Our first case, Kociemba v. G.D. Searle & Co., came to trial in May 1988. Mr. Huber, although not specifying the case name, was obviously referring to Kociemba in his reference to "one large wild card verdict on the Copper 7 some years ago."

Kociemba was not a "wild card verdict." Instead, Kociemba was the first case to be tried in which the plaintiffs' attorneys had the resources -- both temporal and financial -- to confront Searle with meaningful opposition. Further, Kociemba was the first Cu-7 case in which a jury was presented with the full story of the Cu-7, as contained in Searle's own internal documents.

The Kociemba verdict of $1.75 million in compensatory damages and $7 million in punitive damages represents one Midwestern jury's reaction to Searle's failure to warn -- and, as the jury specifically found, Searle's intentional misrepresentations -- to American women and the medical profession of the risks and dangers of the Cu-7.

This verdict was upheld by the federal judge who presided over the four-month long trial. (The court reduced the compensatory award by $600,000 in accordance with a Minnesota statute which caps damages for emotional distress.) In denying Searle's post-trial motions, United States District Judge Robert G. Renner wrote:

> At trial, plaintiff presented evidence which would have allowed a reasonable jury to conclude that defendant knowingly placed millions of American women, especially nulliparous women, at risk of serious infection, loss of fertility, and surgery for removal of internal organs. Plaintiff also presented evidence that could have allowed the jury to reasonably conclude that responsibility for this conduct was shared throughout defendant's corporate hierarchy, and that the conduct continued for over ten years.

Kociemba v. G.D. Searle & Co., 707 F.Supp. 1517, 1537 (D. Minn. 1989).

The reference to "nulliparous" women is to women who have not borne children. Historically, there was a particular concern about the use of IUDs in nulliparous women. In fact, the prevailing view through 1970, when Searle acquired the rights to the Cu-7, was that IUDs were not appropriate for nullips. Searle was well aware of the medical wisdom that IUDs should not be inserted in nulliparous women. Indeed, Searle was warned by one of its own consultants as early as 1974 -- the year Searle began to sell the Cu-7 in the United States -- that IUDs "could not be recommended for patients who had not had children." Exhibit 520 (attached). Searle internal documents also reveal that the company was aware by 1976 of a study reporting a six-fold increase in pelvic inflammatory disease (PID) in nulliparous women with copper IUDs and another recommendation "that IUDs should not be used as a contraceptive of choice in nulli-para women." Exhibit 695 (attached).

The fact that Searle failed to contraindicate the Cu-7 for nulliparous women is frightening evidence -- by itself -- of its disregard for the rights and safety of others. But Searle not only failed to contraindicate the Cu-7 for nullips, the company actually targeted nulliparous women in its marketing promotions in an effort to boost sales.

For example, in a 1972 article published by Searle, the company recognized that "[e]xperience with traditional intrauterine devices led to a frequent unwillingness of physicians to attempt to insert them in nulliparous patients." Exhibit 370 (attached). Nevertheless, Searle touted the Cu-7 as "particularly suitable for use in nulligravida." Id. Similarly, Searle used physician advertising to promote the Cu-7 as "In A Class By Itself" and "suitable for multipara and nullipara." Exhibit 601 (attached).

Searle's extensive promotional activities had their intended effect. By 1975, about 40 percent of Searle's Cu-7 sales were to nulliparous women (like Esther Kociemba). Exhibit 574 (attached). In addition, more than 70 percent of Searle's Cu-7 sales were to women (like Esther Kociemba) who were under 25 years old, even though young women were another group at high risk of PID with IUDs. Id.

When physicians notified Searle of their concern for nulliparous women using the Cu-7, Searle fraudulently reassured them. A striking example of Searle's fraud upon the medical profession is illustrated in two Searle documents, authored by the same Searle official on the same day in 1980. In the first document, Searle wrote to a physician who "expressed considerable concern regarding the development of pelvic inflammatory disease in association with intrauterine devices, particularly with regard to such usage by nulliparous individuals." Exhibit 1001 (attached) Searle essentially assured the physician that PID in nulliparous women using the Cu-7 was not a concern. Id. However, in an internal memorandum written the very same day, the same Searle official wrote that, despite the letter to the physician, the fact was that:

> All studies with which I am familiar conclude that all IUDs enhance the potential for PID and to a greater degree in nulliparous than in multiparous.

Exhibit 1000 (attached).

In light of this evidence, the Searle official was asked in a deposition video-taped for use at trial why the company never contraindicated the Cu-7 for nulliparous women. The official testified:

> The only rational response I can give you is, I don't know.

Deposition of Dr. Robert Alberti (attached).

Even Mr. Huber vaguely acknowledged in his testimony that the Cu-7 was not the proper contraceptive choice for all women. But he completely ignored the issue of the use of the Cu-7 by nulliparous women. He listed several medical organizations which, he asserted, believe the Cu-7 to be a "superior contraceptive" for "older women." But he failed to mention that the "mainstream groups" for years have recognized the unsuitability of IUDs for nulliparous women -- but turned their heads while Searle persistently marketed to these most vulnerable women.

Mr. Huber also stated that the Cu-7 "is generally not recommended for young women who are sexually active because for those women there are other options, maybe somewhat better." Obviously, Mr. Huber's use of the term "sexually active" is a euphemism since no one other than "sexually active" women would need a contraceptive. If Mr. Huber was attempting to refer politely to women with "multiple sexual partners," we would agree with most responsible authorities that the Cu-7 should not be inserted. Despite this long-standing wisdom, however, as late as 1978 Searle authorized the promotion of a Cu-7 necklace. An ad for the necklace was published in the July 1978 issue of Playgirl ("entertainment for women" magazine). Exhibit 837 (attached). "The 'In' Necklace," the ad proclaimed. "Show your independence. NOW!"

In this short letter, it is impossible to fully convey the egregiousness of Searle's misconduct in the design, testing and marketing of the Cu-7. We have merely attempted to address some of the issues raised by Mr. Huber in his testimony.

From his inaccurate factual predicate regarding the Cu-7, Mr. Huber in his testimony leaped to unfounded conclusions regarding the catastrophic consequences that have befallen this country's women because of the lack of contraceptive options. Surprisingly, Mr. Huber cited estimates by Dr. Elizabeth Connell in this regard. Mr. Huber failed to mention, however, that Dr. Connell testified as a witness for Searle in Kociemba. Mr. Huber also failed to note that Dr. Connell served on the Food and Drug Administration's Obstetrics and Gynecology Advisory Committee when it evaluated the Cu-7 in 1973. In a transcript of that committee discussion on the Cu-7, Dr. Connell stated:

> If you look at all the data presented, this is, again, very disappointing. Because the copper data looked less good, and the shield much better than I had anticipated.

Exhibit 410. The "shield," of course, is the Dalkon Shield, which even Mr. Huber declined to defend.

In short, far from proving Mr. Huber's case about the American products liability system, the fact is that the Cu-7 story demonstrates that -- although the odds are skewed very much against the victims -- our products liability system can work to protect innocent consumers from willful misconduct by the very few corporations which abuse our free enterprise system and violate our common law. If not for the incentives and deterrents provided by our products liability law, American women would still be at risk from use of the Cu-7. Indeed, despite Mr. Huber's contentions, without the products liability system American women would still be at risk from use of the Dalkon Shield. With both of these IUDs, it was the American system of jurisprudence -- the civil juries, punitive damages and contingency fees of which Mr. Huber complains -- which protected the American consumer. Under our present laws, few law firms have the necessary resources to adequately undertake to represent victims in products liability actions. Any change in our system would only make the odds that much greater against the American people in any effort to obtain justice against those minority of American corporations which abuse the public trust.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI

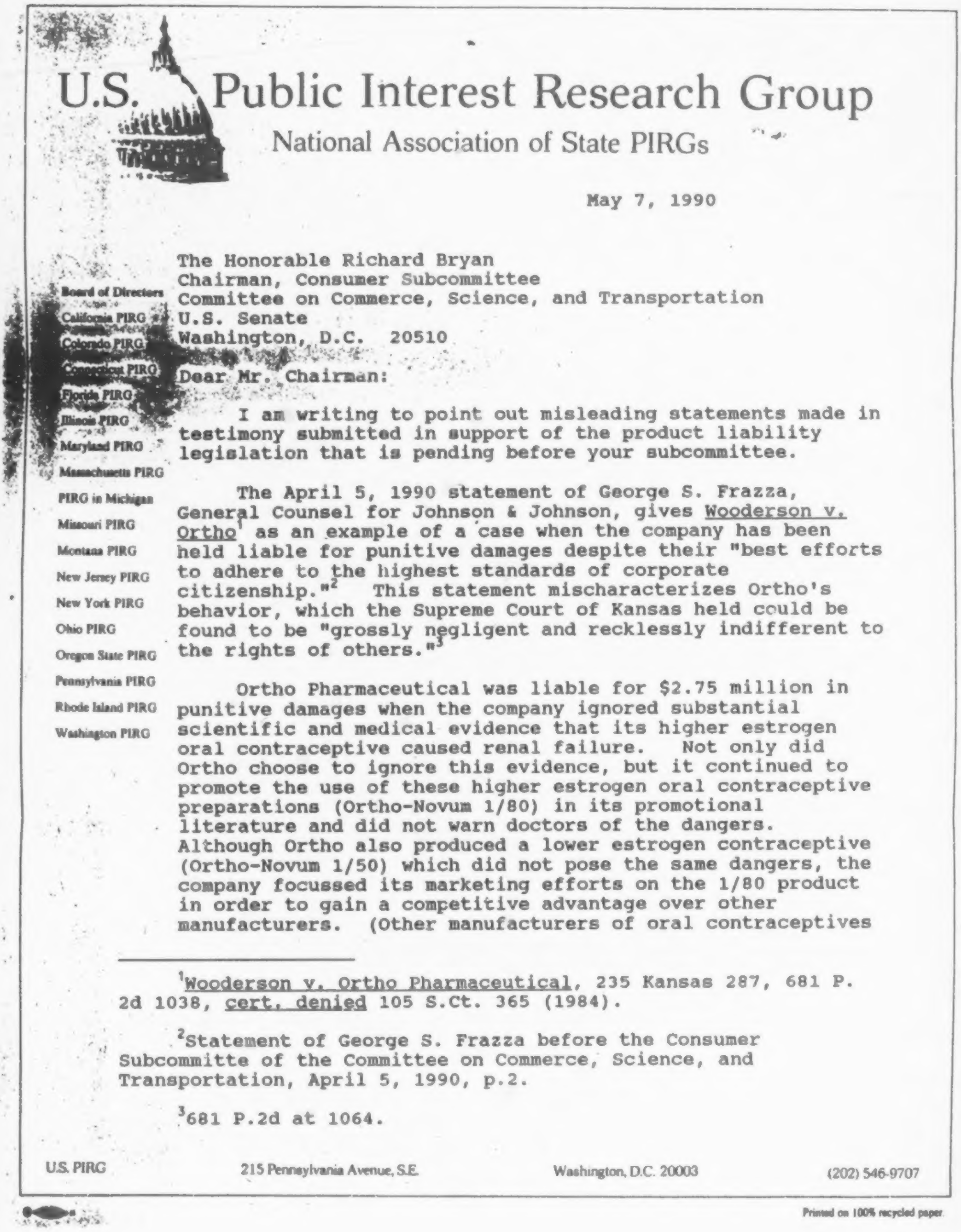
Michael V. Ciresi

Roberta Walb

Roberta B. Walburn

Enclosure 1/

1/ The enclosures were not reproducible.



U.S. Public Interest Research Group
National Association of State PIRGs

May 7, 1990

The Honorable Richard Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

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Dear Mr. Chairman:

I am writing to point out misleading statements made in testimony submitted in support of the product liability legislation that is pending before your subcommittee.

The April 5, 1990 statement of George S. Frazza, General Counsel for Johnson & Johnson, gives Wooderson v. Ortho[1] as an example of a case when the company has been held liable for punitive damages despite their "best efforts to adhere to the highest standards of corporate citizenship."[2] This statement mischaracterizes Ortho's behavior, which the Supreme Court of Kansas held could be found to be "grossly negligent and recklessly indifferent to the rights of others."[3]

Ortho Pharmaceutical was liable for $2.75 million in punitive damages when the company ignored substantial scientific and medical evidence that its higher estrogen oral contraceptive caused renal failure. Not only did Ortho choose to ignore this evidence, but it continued to promote the use of these higher estrogen oral contraceptive preparations (Ortho-Novum 1/80) in its promotional literature and did not warn doctors of the dangers. Although Ortho also produced a lower estrogen contraceptive (Ortho-Novum 1/50) which did not pose the same dangers, the company focussed its marketing efforts on the 1/80 product in order to gain a competitive advantage over other manufacturers. (Other manufacturers of oral contraceptives

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[1] Wooderson v. Ortho Pharmaceutical, 235 Kansas 287, 681 P. 2d 1038, cert. denied 105 S.Ct. 365 (1984).

[2] Statement of George S. Frazza before the Consumer Subcommitte of the Committee on Commerce, Science, and Transportation, April 5, 1990, p.2.

[3] 681 P.2d at 1064.

U.S. PIRG 215 Pennsylvania Avenue, S.E. Washington, D.C. 20003 (202) 546-9707

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were also producing the 1/50 dosage, but Ortho was the only company selling the 1/80 dosage.)

Mr. Frazza makes a second misleading and inaccurate representation about the Wooderson case when he claims that the FDA had determined that the drug's association with renal failure did not merit warnings. Mr. Frazza states, "The jury punished our Ortho subsidiary to the tune of $3 million for failing to warn of this association, even though the federal Food and Drug Administration specifically considered and disapproved exactly that warning because there was no medical justification for it."[4]

The Kansas Supreme Court considered this very argument and found that it was without merit:

> Ortho also argues that the FDA has determined that contraceptive-induced HUS does not merit warnings, and that the courts of Kansas must defer to the FDA's determination. This argument centers around a letter from the FDA to Searle Laboratories. Searle had proposed fifteen or more package insert changes, covering many and varied subjects. Only one of those mentioned the inclusion of HUS as a possible side effect. The FDA responded that it did not concur with the additional changes included in that proposal. This letter cannot be construed as a clear determination by the FDA that contraceptive-induced HUS does not merit warnings, and thus **this argument has no merit.**[5]

This type of misleading anecdotal testimony does a disservice to your hearings which have been notable for their substance, focus, and fairness. Please include this letter as part of the record.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions.

Sincerely,

Lucinda Sikes

Lucinda Sikes
Staff Attorney

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[4] Statement of Frazza, p.3.

[5] 681 P.2d at 1057 (emphasis added).

Monsanto

DAVID S. J. BROWN
Vice President, Government Affairs

Monsanto Company
Suite 1100
700 14th Street, N.W
Washington, D.C. 20005

June 7, 1990

The Honorable Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science and Transportation
SH-227 Hart Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

On May 10, 1990, at your Consumer Subcommittee's hearing on S. 1400, some allegations were raised by a witness from Consumer Union about Monsanto's decision to abandon a potential product involving phosphate fibers. I request that the May 17 letter from Monsanto's Chairman and Chief Executive Officer to you be made part of the record on S. 1400.

In addition, I submit the following documents and request that they be made part of the record:

> May 15, 1986 letter from Joseph J. Narciso, Program Director, Phosphate Fiber, Monsanto Company, to Document Control Officer, EPA;
>
> July 6, 1987, letter from George Roush, Jr., M.D., Director, Medicine and Health Science, Monsanto Company, to Dr. Joseph J. Merenda, Director, Existing Chemical Assessment Division, EPA;
>
> A Summary of the Chronic Inhalation Toxicity Study in Rats with Calcium Sodium Metaphosphate Fiber, prepared by Dr. Rashmi S. Nair, Manager, Product Toxicology, Monsanto Company;
>
> Abstract of A Two-Year Inhalation Toxicity Study of Calcium Sodium Metaphosphate Fiber in the Rat, June 1, 1990.

Sincerely,

David S. J. Brown

cc: The Honorable John C. Danforth

TELEPHONE (202) 783-2460 FACSIMILE (202) 783-2468

Monsanto

RICHARD J. MAHONEY
Chairman and
Chief Executive Officer

Monsanto Company
800 N. Lindbergh Boulevard
St. Louis, Missouri 63167
Phone: (314) 694-3756

May 17, 1990

The Honorable Richard H. Bryan
Chairman, Consumer Subcommittee
Committee on Commerce, Science and Transportation
SH-227 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Last week, questions were raised on the record during your subcommittee hearing on S. 1400 about Monsanto's decision to cancel a safe asbestos substitute just prior to commercialization. It is important that your committee understand the reasons that led to the cancellation of this phosphate fiber product, which would be safe, biodegradable, and effective.

This decision to abandon the project came after we received 18 months of data from an ongoing chronic inhalation test designed to assess the health risk of phosphate fiber on humans. The results demonstrated that phosphate fiber showed no evidence of fibrogenic response like that caused by asbestos. Based on the data, it was our opinion that there was a high probability of gaining EPA agreement that the product was safe and, therefore, clearance.

Despite that, I personally made the decision to stop further work because of the potential costs that could have resulted from product liability litigation. It was very clear to us that a whole generation of lawyers has been schooled in asbestos liability theories that could be turned against this or any similar substitute. As the Monsanto director of the program said when the decision was made, "seven-figure jury awards on claims without merit are enough to send shivers down anyone's spine."

The concern about unwarranted litigation was the sole reason for the decision. Any allegation that Monsanto cancelled the project for other reasons is simply not true.

Regarding the intrapleural implant test cited by others as demonstrating that phosphate fiber might be an unsafe product, it is important to stress that this test was never undertaken to assess the potential health risk to humans. It was undertaken only to determine the biological activity of the fiber. Even if the results of the implant study were negative, we would have not made any safety or health judgements based on them. Many in the scientific community, including experts from the EPA, NIOSH, the National Cancer Institute, the International Agency on Cancer Research and the World Health Organization, have cautioned against extrapolating the results of intrapleural implant studies to humans.

The definitive research on this product was the chronic inhalation study mentioned above, which was begun two years before the phosphate fiber project was terminated. Monsanto's Biohazards Committee, a panel of outside, independent toxicological experts, reviewed this study and concluded from the scientific data presented that phosphate fiber is safe. The results of this 30-month chronic inhalation study will soon be published and the final report will be submitted to the EPA.

In summary, the only reason Monsanto terminated the phosphate fiber project was because the risks involved in defending this product against unfair safety and health allegations far outweighed any rewards that would be gained by its commercialization.

The fact that my decision to abandon our phosphate fiber program was the subject of sensational allegations dramatizes the problem with existing product liability law. It reaffirms my decision, and it reinforces the need to reform the current legal situation as S. 1400 will do.

Sincerely,

Richard J. Mahoney

/acm

cc: The Honorable Ernest F. Hollings
The Honorable John C. Danforth
The Honorable John D. Rockefeller
The Honorable Slade Gorton
The Honorable John McCain
The Honorable Robert W. Kasten, Jr.
The Honorable Larry Pressler

Monsanto

Monsanto Company
800 N. Lindbergh Boulevard
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Phone: (314) 694-1000

May 15, 1986

Document Control Officer (TS-790)
Attn: Section 8(e) Coordinator
Information Management Division
Office of Toxic Substances
U. S. Environmental Protection Agency
401 "M" Street, S.W.
Washington, D.C. (20460)

Re: FYI-OTS-0386-0486

Dear Sir:

In response to the U.S. EPA's letter from Mr. Joseph J. Merenda to Mr. J. R. Condray of Monsanto Company dated April 14, 1986, Monsanto is transmitting this submission to the Document Control Officer as directed by Mr. Merenda. In the April 14th letter, the Agency requested Monsanto to provide a rationale as to why the results of the intrapleural implant study with Calcium Sodium Metaphosphate Fiber (Phosphate Fiber) were not reported formally to EPA under section 8(e) of TSCA. Monsanto remains convinced that the findings of this study do not support the conclusion that Phosphate Fiber presents a substantial risk of injury to health or the environment. Monsanto did the pleural implant study with the expectation that Phosphate Fiber would biodegrade and thus would not produce tumors in the worst case test. This study was never intended to be a basis for evaluating health risk in the workplace. The Phosphate Fiber did not completely degrade under the conditions of this study. Since the fibers were present, the finding of pleural fibrosarcomas is not unexpected. Thus it is our position that:

1) *It is inappropriate to extrapolate risks to man based on the results of the rat intrapleural implant study. Numerous scientists have expressed this view as illustrated by the following quotes.*

    a) Stanton, one of the initial investigators to conduct intrapleural implant studies, cautioned against their use for extrapolation to human risks. In the Journal of National Cancer Institute (58(3): 587, 1977), he stated "We have previously emphasized that our experiments explore mechanisms of fiber carcinogenesis at the proximal site of susceptible tissues rather than acting as an estimate of the overall hazard of different fibers to man (1). Clearly fibers must have the opportunity to reach the target tissue to cause cancer. Our experiments are inappropriate for evaluating many aspects of environmental hazard, since they circumvent those factors that might inhibit or enhance exposure through natural routes."

(1) The reference as provided by Stanton is "Stanton, M.F., Wrench, C: Mechanisms of mesothelioma induction with asbestos & fibrous glass. J. Natl. Cancer Inst. 48: 797-821, 1972." In this 1972 paper Stanton said, "Direct application of our results to the problems in man would be unwise because the method of application and the high doses used are remote from the usual exposure of man to fibers, but how these materials exert their carcinogenic effect is a critical problem and current data seem adequate to develop a working hypothesis."

b) Wagner, who used intrapleural injection rather than implantation to test fibers has stated, "There are clear dangers in extrapolating from injection experiments to man; a positive result in an injection experiment may be regarded as an indication that an inhalation experiment be carried out." (Wagner et al. Comparative Effects of Three Chrysotiles by Injection and Inhalation in Rats in Biological Effects of Mineral Fibers, Ed. Wagner, J.C. WHO/IARC, IARC Scientific Publication No. 30. pp 363-372, 1980).

c) The National Cancer Institute also has cautioned that the results of studies which are conducted by routes other than normal routes of human exposure cannot be extrapolated to man. The National Cancer Institute's Ad Hoc Committee on Evaluation of Low Levels of Environmental Chemical Carcinogens identified two conditions under which it would be inappropriate to extrapolate the results of animal carcinogenesis data to man: "...only where the carcinogenic effect is clearly shown to be the result from physical rather than chemical induction or where the route of administration is shown to be grossly inappropriate in terms of conceivable human exposure." The intrapleural implant study satisfies both of these conditions in that (i) the investigators who have conducted these experiments have indicated that tumor response is based on physical characteristics rather than chemical composition and (ii) the introduction of fibers into the intrapleural cavity is clearly an "inappropriate route of human exposure." (National Cancer Institute. Ad Hoc Committee on The Evaluation of Low Levels of Environmental Chemical Carcinogens: Report to the Surgeon General. U.S.P.H.S. April 22, 1970)

A similar position was also expressed in another publication by the National Cancer Institute (J. Natl. Cancer Inst. 58 (2): 461-463, 1977) and in a paper entitled "General Criteria for Assessing the Evidence of Carcinogenicity of Chemical Substances: Report of the Subcommittee on Environmental Carcinogenesis, National Cancer Advisory Board." NCI identified 4 bioassay methods for which the results require additional studies before extrapolations to particular conditions of human usage. The one method most applicable to the Monsanto intrapleural implant study as cited by NCI is "...bioassays in which the test compound is given by unusual routes of administration (such as bladder implantation) and there is reason to believe that the tumors that occurred may not be due to specific effects of the test compound. This does not mean, however, that substances should only be tested in animals by the same route of administration as pertains to human exposure."

d) The Environmental Protection Agency, in its Proposed Guidelines for Carcinogen Risk Assessment (FR49, No. 227, 46294-46301, 1984) also has emphasized the importance of reviewing the route of exposure. The Agency said, "The mechanism of the carcinogenic responses under conditions of exposure should be reviewed carefully as it relates to the relevance of the evidence to human carcinogenic risks (e.g. the occurrence of bladder tumors in the presence of bladder stones and injection site sarcomas)."

e) The National Institute of Occupational Safety and Health (NIOSH) came to a similar conclusion in its Criteria Document on Fibrous Glass

(NIOSH - Criteria for a Recommended Standard Occupational Exposure to Fibrous Glass, April. 1977). With regard to positive intrapleural fibrous glass implant studies, NIOSH concluded "Experimental studies in animals have demonstrated carcinogenicity; however, with the test method employed (implantation), it is not considered that these results can be extrapolated directly to conditions of human exposure."

f) In the intrapleural implant study, large number of fibers are placed in the intrapleural space in order to enhance the probability of tumor response. Clearance of biologically non-durable fibers may be limited because of this large dose. Lee (CRC Critical Reviews in Toxicology, Vol. 14(1), 33-88, 1985) discussed this issue and stated "It should be noted that intrapleural or intraperitoneal injection of asbestos or manmade fibers has little relevance to man because of unnatural exposure route, the large quantity of material used and avoidance of the lung defense mechanism."

g) Results of implant study should be reviewed with caution because implantation of inert materials such as plastic into mice leads to formation of sarcomatous implantable tumors (Oppenheimer & Oppenheimer. Proc. Soc. Exp. Biol. Med. 67: 33-34, 1948 and Brand et al., J. Natl. Cancer Inst. 39 (4): 663-675, 1967).

h) It is of interest to note that while many references recommended the use of the intrapleural implant study as a screening tool to assess toxicity of fibers, no reference took the position that the results should be directly extrapolated to risk in humans.

2) *Monsanto's Interpretation of the Positive Result*

a) Other fibers (e.g. fiberglass) which have been shown to be positive in the intrapleural implant study (Stanton et al, J. Natl. Cancer Inst. 58 (3): 587-603, 1977) do not produce mesotheliomas or bronchial carcinomas after inhalation exposure to animals (Ralph I. Mitchell et al., "A Chronic Inhalation Toxicology Study in Monkeys and Rats Exposed to Fibrous Glass," NIOSH Contract No. 210-78-0037, submitted to NIOSH, March 15, 1982) or more importantly in man. This clearly indicates that one cannot directly extrapolate results of an intrapleural implant study to cancer risk in man.

b) Other data developed on Phosphate Fiber by Monsanto Company show that Phosphate Fiber can be degraded in biological systems. We have conducted experiments in vitro and in vivo to show degradation of Phosphate Fiber. Monsanto Reports entitled "An Evaluation of the Biodegradability of Radiolabeled Cultured Lung Cells" (Attachment 1) and "Pulmonary Clearance of Calcium Sodium Metaphosphate Fibers in Rats" (Attachment 2) accompany this submission. These studies show that over a seven day period, rat lung epithelial cells and rat alveolar macrophages increase the degradation of Phosphate Fiber in culture media by two- and seven-fold, respectively; also, after intratracheal inhalation, approximately 93% of the initial fiber load is cleared by six months and after intratracheal instillation approximately 84% of the initial fiber load is cleared in six months. These data indicate that after normal routes of exposure the possibility of a significant number of fibers ever reaching the intrapleural cavity is remote.

c) We have developed in vitro data to show that a certain portion of phosphate fiber is physically soluble in different aqueous media. A letter from the chemist discussing this physical solubility of phosphate fiber is attached (Attachment 3). This physical solubility of phosphate fiber should aid its degradability in biological systems.

d) The reason Monsanto believes that gelatin may have decreased the dissolution of Phosphate Fiber is primarily based on our biodegradation data cited above. Moreover, chemical reaction is known to occur between polyphosphates and gelatin. We are attaching three references which document the reaction between polyphosphates and gelatin (Attachment 4). Since this reaction with gelatin may have decreased dissolution of Phosphate Fiber, the observed effect is not representative of that which would be produced by the fiber itself. The reason Phosphate Fiber was embedded in gelatin is that Dr. Stanton of the National Cancer Institute had used it in all of his earlier experiments.

e) While we agree with EPA that intrapleural fibrosarcoma are rare tumors in naive rats, a low incidence of pleural fibrosarcomas has been observed in rats on which a thoracotomy was performed and a non-carcinogenic material was implanted in the pleural cavity. The best discussion of these data was found in publications by Stanton et al. Stanton & Layard (National Bureau of Standards Special Publication no. 506, 1978) stated, "Pleural sarcomas have not been observed in several thousand untreated controls; however, pleural sarcomas have occurred in rats treated only by simple thoracotomy. Our best estimate of these non-specific, background pleural sarcomas in treated controls is in the range of 2-4 percent. This is important to keep in mind since it makes interpretation of low level response unreliable with small numbers of animals." In a later publication by Stanton et al. (J. Natl. Cancer Inst., 67 (5): 965-975, 1981), he indicated, "The incidence of clearly apparent pleural neoplasms in untreated aged outbred Osborne-Mendel female rats was essentially nonexistent. However, a few pleomorphic sarcomas that might be confused with pleural tumors occurred in the left thorax of both treated and to a lesser degree untreated controls. Although these tumors involved the thickness of the chest wall, in most cases they appeared to be derived either from mammary gland fibroadenoma or from suture granuloma in the subcutaneous tissues. But there remained a few tumors for which no definite origin could be determined and which were histologically comparable with pleural sarcomas. In both the experimental groups and the control groups these questionable tumors were counted as pleural sarcomas. These essentially confusing tumors observed in the controls need to be taken into account in the assessment of the carcinogenicity of the experimental materials. The incidence of pleural sarcomas in all 3 control groups combined, calculated by the life table method, was 7.7 ± 4.2%. Comparison of this incidence with the pleural sarcoma incidence in the 72 experiments showed that the incidence of pleural sarcomas in a particular experimental group was significantly greater than that in the combined control group only if it exceeded 30%."

f) As discussed in our initial submission to the Agency, the pleural response to the test fiber was different than that to asbestos. We now have a copy of the final report for the pleural implant study and we are providing the Agency a copy of this report (Attachment 5). Note that the incidence of pleural fibrosarcomas in the asbestos group has changed to 4 tumors. In the March 5 letter to the Agency we had reported 5 pleural sarcomas in the asbestos group. The initial submission to the Agency was based on phone conversation reports. The final report was received on May 13, 1986. Also, the pathologist states "The differences in pleural responses between pledgets containing the test fiber and those containing the asbestos fiber are biologically significant; the chrysotile fibers elicited the characteristic acellular collagenous tissue response expected while the test compound, as already stated, elicited primarily a highly cellular response of a mixed nature (lymphocytes, macrophages, fibroblasts and foreign body giant cells). The granulomatous lesion which precedes malignant transformation in asbestos fiber carcinogenesis is quite acellular and collagenous. The fibrosarcomas observed with the test compound were atypical because their matrix was quite cellular as the study progressed." Thus while the incidence of fibrosarcomas in the asbestos group and phosphate fiber group are similar, the tissue response is different. This difference may reflect that unlike asbestos, Phosphate Fiber may not be toxic to the lymphocytes and macrophages, etc.

g) Three cardiac tumors (1 cardiac fibrosarcoma in asbestos group and a cardiac osteosarcoma and a granular cell myoblastoma in phosphate fiber group) have also been identified in this final report but are not considered compound related. Sections of these tumors have been evaluated by a consultant pathologist and he is in agreement that these tumors are not compound related. A copy of his letter report is attached (Attachment 6).

h) We have other in vitro data which support our position that Phosphate Fiber is different from the more toxic asbestos fiber. These data are cited below. We compared the cytotoxicity of Phosphate Fiber to two forms of asbestos (chrysotile and crocidolite) and to two samples of fiberglass in three different types of cells - rat epithelial cells, rat alveolar macrophages and Chinese hamster ovary cells. Using the LDH release as an endpoint, we found Phosphate Fiber to be an order of magnitude less toxic than both forms of asbestos and equitoxic to fiberglass (Li et al. The Toxicologist Vol. 6. No. 1, Abs. No. 548, 1986). These data indicate that Phosphate Fiber would be more like fiberglass than like asbestos.

h) We have not observed a fibrogenic response in a 6 month period after intratracheal instillation of 0.5 mg of Phosphate Fiber or after a similar intratracheal inhalation exposure. Note that Osheroff et al. (The Toxicologist, Abstract No. 515, 1985), had previously shown that a similar dose of crocidolite asbestos can produce fibrosis in the 6 month period. Osheroff was one of the investigators who performed our study. Results of the intratracheal instillation experiment are being submitted to the Agency as part of the report on pulmonary clearance of fibers. One of the key factors in chemically inert material carcinogenicity is the formation of a unique avascular fibrous tissue (Bryson & Bischoff, Silicate-induced neoplasms. Progr. Exp. Tumor Res. 9: 77-164). Also, as indicated to the Agency earlier, Monsanto is conducting a chronic inhalation study with Phosphate Fiber at concentrations of 1, 5 or 25 mg/m^3. At the 3-month sacrifice no histopathological changes in the lungs were observed. This finding is of particular significance since the sample of Phosphate Fiber has been milled to increase the respirable fraction of fibers so as to exaggerate the exposure as compared to normal Phosphate Fiber exposure.

i) A consultant pathologist who reviewed the slides from the intrapleural implant study stated "In the current experiment, matted masses of fibers were seen two years after their introduction. The processes of clearance by solution and metabolic clearance can not and did not take place after this massive intrapleural dosage."

3) *Airborne Exposure is Low.*

a) We are also reassured by the low exposure in the workplace to Phosphate Fiber. The use of Phosphate Fiber does not produce airborne dust since the finer fibers have a natural tendency to adhere to larger fibers due to coulombic forces.

b) Industrial hygiene monitoring conducted in the pilot plant supports this hypothesis in that exposures are at or below 0.04 fibers/cc. We have adopted an internal guideline of 2 fibers/cc and this limit has been communicated to our customers via our Material Safety Data Sheet.

In summary, Monsanto's position is that the results of the intrapleural implant study can not be extrapolated to cancer risks in man. At the beginning of this letter we have provided evidence that this position is universally accepted by investigators who have conducted this test and also by many governmental agencies. Moreover, we feel that we have other data to show that Phosphate Fiber will be cleared from the body under normal routes of exposure and thus will not approach the high concentrations placed in the pleural cavity in this study. Our *in vitro* data has also shown that Phosphate Fiber is an order of magnitude less toxic than asbestos. Nevertheless, we have undertaken prudent action by: (i) timely informing the Agency about the preliminary results of the intrapleural implant study. (ii) establishing a conservative interim exposure guideline for Phosphate Fiber and increasing our industrial monitoring to assure ourselves that we have minimal exposure. Moreover, we are continuing our safety evaluation of this developmental product. The results of the chronic inhalation study will be utilized for evaluating the potential health risks of Phosphate Fiber. We would also like an opportunity to meet with the appropriate individuals in the Agency to discuss this document further after they have had an opportunity to review our submission.

Sincerely,

Joseph J. Narciso

Joseph J. Narciso
Program Director
Phosphate Fiber

Attachments

cc: Joseph J. Merenda, Director
Existing Chemical Assessment
Division Office of Pesticides and Toxic Substances
U. S. Environmental Protection Agency
Washington, D.C. 20460

A Brief Summary of the Chronic Inhalation Toxicity Study in Rats with Calcium Sodium Metaphosphate Fiber

Groups of 80 male and 80 female rats were exposed to either filtered air, or 1,5,25 milligram per cubic meter (mg/m^3) of suspended Calcium Sodium Metaphosphate (CSM) fibers, 6 hours/day, 5 days/week for 104 weeks. Selected animals were sacrificed at 3, 12, 18 and 24 months and the remaining surviving animals were observed through the course of their lifetime (approximately 29 months). A special recovery group of 5 rats/sex/group was exposed to the fiber for eighteen months and then sacrificed at 24 months. All animals were weighed and observed at regular intervals in the study. Clinical studies on blood from selected animals were conducted at 3, 12 and 24 months. At sacrifice, terminal body weights and organ weights for selected organs were recorded.

Exposure to fibers at these concentrations produced no effects on body weights, hematological or clinical chemistry values. Survival of the animals was not adversely affected by exposure to CSM Fiber. The only consistent effect on organ weights was an increase in lung weight in the high exposure group. During the recovery period, the lung weights returned to normal. Approximately 40 tissues were examined microscopically for each animal. Only the mid and high exposure group animals showed microscopic changes in the lungs and nasal passages which were considered to be a non-specific response to an irritant dust. All tissue and organs including the lungs and nasal passages of animals in the low dose group were considered comparable to the untreated control group. The incidence of tumors in all groups was comparable. In conclusion, under the conditions of this study CMS fiber was not found to be a carcinogen and at high levels produced microscopic changes in the nasal passages and lung which would be expected from exposure to any irritant dust.

By: Dr. Rashmi S. Nair
Manager, Product Toxicology
Monsanto Company

Bio/dynamics Inc.

PROJECT NO. 85-7802

A TWO YEAR INHALATION TOXICITY STUDY OF CALCIUM SODIUM METAPHOSPHATE (CSM) FIBER IN THE RAT

ABSTRACT

Calcium Sodium Metaphosphate (CSM) Fiber was administered by whole body inhalation to Fischer 344 rats for a period of up to 2 years at concentrations of 0, 1, 5 and 25 mg/m^3. Initially, there were 80 animals/sex/group. Scheduled sacrifices for purposes of histopathology were conducted on 10 animals/sex/group at 3 and 12 months and 5 animals/sex/group at 18 and 24 months. A group of 5 animals/sex/group was held for recovery between 18 and 24 months after which survivors were sacrificed. Animals remaining after sacrifice at 24 months were held for recovery until 29 months when all surviving animals were sacrificed. Clinical lab examinations were performed on 10 animals/sex/group at 3, 12 and 24 months.

Analytical determinations for mass concentration and particle size showed reasonable conformity to mass target levels and particle size distribution throughout the exposure period. Mortality patterns showed that males exhibited a slightly greater death rate than females but neither sex appeared to show any dose-related response in this regard. Life table analysis showed that the surviorship of the test animals was not affected by exposure to the test material. Physical observations related to exposure indicated ano-genital staining, chromodacryorrhea and excess lacrimation but the incidence of these findings did not seem potentially dose-related. During recovery periods, the incidence of these findings decreased appreciably. No ocular abnormalities were considered to be attributable to the test substance. Body weights were generally unremarkable.

Hematology data were generally unremarkable except that exposed males showed platelet counts in excess of control at Month 12. This finding was not dose-related nor present at Month 24. Clinical chemistry changes, in spite of some statistical findings for LDH levels in exposed animals (males and females) at 12 months and males at 24 months, as well as decreases in BUN and total bilirubin in males at 24 months, were not considered to be biologically significant.

Organ weight data indicated that the only persistent effect related to exposure seen in all intervals and in a seemingly dose-related fashion was an increase in lung weights as a consequence of exposure. However, this finding did not seem to progress in severity with continuation of exposure and was apparently reversible during recovery periods.

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Specific gross pathologic findings are shown in Table IIA-IIS of Appendix K. These are presented in the various tables according to intervals of exposure or recovery, and whether the animals were routinely sacrificed or experienced an unscheduled death (found dead or killed in a moribund condition). Overall, the findings among all animals from the exposure period, which seem possibly dose-related, were a slightly greater incidence of discolored lungs in males exposed to 5 or 25 mg/m^3, discolored kidneys in males exposed to 25 mg/m^3 and discolored lymph nodes in females exposed to 5 or 25 mg/m^3. There were no noteworthy findings during necropsy of animals from either of the post-exposure recovery groups.

Effects on the nasal turbinates consisted primarily of the following;

Nasal lumen:	Accumulation of eosinophilic material
Nasal mucosa:	Congestion
Mucosal glands:	Dilated
Respiratory epithelium:	Goblet cell hyperplasia
Nasal mucosa-epithelium:	Hyperplasia/pseudoduct formation
Nasal mucosa-epithelium:	Intracytoplasmic eosinophilic material
Nasal mucosa-epithelium:	Cytoplasm-vacuolated/vesiculated
Nasal mucosa-epithelium:	Acute necrosis
Pharyngeal sinuses:	Goblet cell hyperplasia
Paranasal sinuses:	Accumulation of eosinophilic material
Vomeronasal region:	Mucosal glands dilated
Vomeronasal organ:	Epithelium-vacuolated/vesiculated

These effects (incidence and/or mean severity) tended to be most pronounced in animals exposed to 25 mg/m^3 and in animals which died or were killed after 18 months of exposure. These effects were considered primarily to be a non-specific response of the nasal tissues to the presence of an irritant. In the lungs, there were findings of subacute/chronic interstitial inflammation with accompanying mild interstitial fibrosis, accumulation of intra-alveolar macrophages and thickening of the junction between the terminal bronchioles and alveolar ducts. These findings were most pronounced in animals exposed to 25 mg/m^3 and at the end of 24 months of exposure as compared to lower exposure levels or earlier sacrifice periods. The incidence and severity of these findings in the lungs and nasal turbinates in the low exposure group of 1 mg/m^3 were comparable to that of control animals.

A comparison of various neoplasms, benign and malignant, and their incidence in males and females from exposure to either 1,5 or 25 mg/m^3 when compared to controls showed no apparent relationship to the test substance.

In summary, 1 mg/m^3 was considered to be a no-observed-effect-level (NOEL) and the findings at the higher concentrations were judged to be the expected responses to chronic inhalation of an irritant. Also, under these exposure conditions of this study, the calcium sodium metaphosphate fiber is not a carcinogen.

Monsanto

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July 6, 1987

Dr. Joseph J. Merenda
Director, Existing Chemical Assessment Division
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Dear Dr. Merenda:

In our letter to you on September 22, 1986, on calcium sodium metaphosphate fibers, we stated we would keep EPA informed on these fibers. We are writing to inform you that Monsanto has decided to terminate its phosphate fiber program.

While market acceptance, process development, and product safety results to date have been encouraging, the unpredictable potential for further expansion or misapplication of product liability laws, have caused Monsanto to reassess the phosphate fiber development program. These uncertainties have led to the decision to terminate the program and not enter this market.

We have, however, decided that we will continue the two-year inhalation study with the phosphate fiber. This two-year phosphate fiber inhalation study has passed three major reviews - 3, 12 and 18-month animal sacrifices. After the first three months of testing, no treatment-related pathological changes nor any indication of fibrosis were observed. After a full 18 months of exposure (February, 1987), non-specific changes indicative of a low-grade irritant was seen in the mid- and high-dose rats with a clear-cut no-effect level at the low dose. There has been no evidence of a fibrogenic response like that elicited by asbestos. Likewise, no indication of a tumorigenic or pretumorigenic tissue response has been observed. The types of changes observed in the 18th month interval are similar to what would be expected from an irritant material. The above data, we believe, continue to support our position on product safety as previously communicated.

Because of the changing philosophy about the significance of a lifetime versus a two-year study, we have decided to continue the study for 30 months. The 24-month portion of the study will be completed in August of 1987. Interim sacrifice will be done at 24 months. We expect there will be sufficient survival to carry the experiment for 30 months. Upon completion of the lifetime study, pathological study, and write-up, we will send you a copy of the final report.

If you have questions regarding the results of the interim sacrifices in the inhalation study, we will be happy to try to answer them.

Sincerely,

FOR George Roush, Jr., M.D.
Director
Medicine and Health Sciences

GR/ct